Supreme Court, U.S.
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IN THE
Supreme Court of the United States

CITY OF SIMI VALLEY,

Petitioner,

v.

PHILIP YOUNG,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May the overbreadth exception to normal standing requirements, which this Court has heretofore limited to overbroad substantive prohibitions on speech, be applied in the context of a purely procedural provision of a time, place, and manner restriction?

2. Does a municipality in designing its zoning laws have the right to prefer certain land uses (such as churches and schools) over adult business uses as long as a legally adequate number of adult business sites are ultimately available?

3. Under *City of Erie v. Pap's A.M.*, 529 U.S. 277, 120 S. Ct. 1382 (2000), may a municipality impose content neutral zoning regulations which have the effect of minimizing or eliminating the operation or number of adult businesses that would otherwise be required as reasonable avenues of communication under *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986)?

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STATEMENT OF JURISDICTION

The United States Court of Appeals for the Ninth Circuit issued its Opinion on June 20, 2000. On July 3, 2000, petitioner filed a Petition for Rehearing and Suggestion for Rehearing En Banc, which the United States Court of Appeals denied on July 31, 2000. Appendix C at 55a-56a. This Petition for a Writ of Certiorari is filed within 90 days of the denial of the Petition for Rehearing. The Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1254(1) and 2106.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., amend. I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const., amend. XIV, sec. 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

City of Simi Valley Ordinance No. 796
(Set forth in Appendix D at 57a-67a)

STATEMENT OF THE CASE

This action arises from a constitutional challenge to petitioner City of Simi Valley's ("Simi Valley" or the "City") zoning ordinance regulating the location of nude dancing establishments, adult movie theaters and other adult-oriented businesses.

In late 1992, respondent Philip Young ("Young") applied for a special use permit to open and operate an adult nude dancing establishment at 999 East Los Angeles Avenue in Simi Valley. Young was the only person ever to have applied for a permit to operate an adult business in Simi Valley. Appendix A at 26a.

On May 3, 1993, Simi Valley adopted Ordinance No. 796, a zoning scheme regulating all adult businesses.

Appendix D at 57a-67a. Under the ordinance, no adult business[1] is permitted to be located within 500 feet of any residential zone or youth-oriented business,[2] within 1,000 feet of any other adult business, or within 1,000 feet of any "public or private school, park playground, church or other place of worship, or any noncommercial establishment operated by a bona fide religious organization." Appendix D at 63a-64a. Additionally, before one may open or expand an adult business, the applicant is required to obtain a special use permit. Appendix D at 64a-65a.

Because the ordinance precluded an adult business at his chosen location, Young abandoned his project and, on December 12, 1994, he filed a lawsuit challenging the ordinance's constitutionality in the United States District Court for the Central District of California. Appendix A at 5a. The district court assumed jurisdiction pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1343(a)(3).

While the lawsuit was pending, Young found an alternate location at 585 East Los Angeles Avenue. Young applied

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1. Adult businesses within the scope of the ordinance include "adult book stores, adult cabarets, adult hotels and motels, adult massage parlors, adult motion picture arcades, adult motion picture theaters, adult mini-motion picture theaters, adult video stores, model studios, and sexual encounter centers." Simi Valley Mun. Code § 9-1.2003. Appendix D at 62a. *See also* Simi Valley Mun. Code §§ 9-1.2002(a)-(j). Appendix D at 57a-60a.

2. A "youth-oriented business" is defined as a business activity which "caters predominantly to on-site patronage by persons under eighteen (18) years of age . . . and which is open for such business not less than twenty-five (25) hours per week." Simi Valley Mun. Code § 9-1.2002(m). Appendix D at 62a.

for a special use permit to operate an adult business at the new location and he also agreed to stay the lawsuit pending the approval of his application. Appendix A at 5a.

On December 8, 1995, exactly 30 days after Young had submitted his development plans, Simi Valley notified Young that his application was complete,[3] but denied his application because it did not comport with the buffer zone requirement in two ways. First, the City discovered that a karate school, a "youth-oriented" business for purposes of the ordinance, was located within 500 feet of Young's site. The karate school was at the location when Young first applied for the zoning permit. Second, the proposed site violated the 1000-foot buffer zone around schools and noncommercial establishments operated by a bona fide religious organization. On December 7, 1995, the day before the City deemed Young's application complete, a religious organization, the Joshua Institute, had filed a zone clearance application to operate an adult bible study class at 665 East Los Angeles Avenue. The City granted the Joshua Institute a zoning clearance the following day. The City informed Young that either the karate school or the Joshua Institute independently would have prevented him from obtaining a special use permit for that site. Appendix A at 6a-8a.

On March 6, 1996, the City Planning Commission rejected Young's application. It ruled that a proposed site's compliance with the buffer zone requirements was to be determined as of the date of the project's approval, rather

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3. Under the ordinance, Simi Valley has 30 days after submission to deem an application complete. Once the application is complete, the City has 94 days to act upon the application. Simi Valley Mun. Code § 9-1.2004(b). Appendix D at 65a.

than as of the date when the application was filed. The Commission noted that Young's application would have been denied in any event because the karate school was in operation when Young filed his application. Young appealed to the City Council, which affirmed the Planning Commission's decision. Appendix A at 8a-9a.

In September 1996, the district court lifted the stay of Young's lawsuit. Young conceded that the ordinance was a time, place, and manner restriction and that Simi Valley had a substantial interest in enacting an adult business zoning ordinance. Young argued, however, that under the second part of the test set forth in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), the ordinance does not allow reasonable alternative avenues of communication. Simi Valley contended that the ordinance was valid under *Renton*. Appendix A at 9a.

The case was tried to a jury in May 1997. The jury unanimously concluded that the ordinance, as applied by Simi Valley, did not violate Young's First Amendment rights. The jury was, however, unable to decide whether the ordinance as a general matter effectively denies persons a reasonable opportunity to own and to operate adult businesses in Simi Valley. Accordingly, no verdict was rendered and the district court declared a mistrial. Appendix A at 9a, 31a; Appendix B at 42a-43a.

On June 9, 1997, Young filed a renewed motion for judgment as a matter of law. The district court granted the motion on two grounds. First, after determining that Young had standing to bring a facial challenge, the district court

held that the ordinance's "sensitive use"[4] provision unconstitutionally gives such uses a de facto veto power over adult business permit applications, and thereby made it unreasonably difficult for an adult use applicant to complete the permit process. Specifically, the district court disapproved of the power given to sensitive use establishments to obtain over-the-counter zoning permits and locate within an adult use permit applicant's buffer zone (thereby disqualifying the applicant) before completion of the adult use permit application process. Second, although Young was the only person ever to have applied for an adult use permit in Simi Valley, the district court found that the existence of four potential sites for simultaneous adult uses did not offer a reasonable number of alterative avenues of communication within Simi Valley as a matter of law. The district court then permanently enjoined Simi Valley from enforcing the ordinance with respect to the distance and buffer zone requirements for adult businesses. Appendix B at 41a-54a.

Simi Valley filed a timely appeal with the Court of Appeals for the Ninth Circuit, which assumed jurisdiction pursuant to 28 U.S.C. § 1291. On August 21, 1998, a divided panel affirmed the district court's decision, although on narrower grounds. Appendix A at 1a-40a.

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4. Under the ordinance, "sensitive use" includes any "youth-oriented business" or any "public or private school, park playground, church or other place of worship, or any noncommercial establishment operated by a bona fide religious organization." Simi Valley Mun. Code § 9-1.2003(d) (Appendix D at 63a-64a); *see also* Simi Valley Muni. Code § 9-1.2002(m) (Appendix D at 62a). A sensitive use disqualifies an adult use permit application if it is located within either 500 feet or 1,000 feet of the prospective adult use site, depending on the particular sensitive use involved. Simi Valley Muni. Code § 9-1.2003(d). Appendix D at 63a-64a.

The majority held that Young had standing under the overbreadth doctrine to challenge the ordinance's so-called "sensitive use veto" provision even though Young's application was rejected for a reason separate and independent of the sensitive use veto, specifically, the proximity of his proposed site to a pre-existing karate school. Nonetheless, according to the Ninth Circuit, Young had standing to raise the rights of non-parties potentially affected by the sensitive use veto because that provision might deter others from seeking to obtain a permit, thereby creating an unacceptable suppression of speech.[5] Appendix A at 11a-13a.

With respect to compliance with *Renton*, the majority found that the ordinance is "content neutral" and designed to serve a substantial governmental interest — combating undesirable secondary effects of adult businesses. Partially reversing the holding of the district court, the majority also concluded that the number of simultaneously available sites under the ordinance (four) were not insufficient, as a matter of law, to provide "reasonable alternative avenues of communication" under *Renton*. Appendix A at 25a-29a.

Notwithstanding these findings, the majority held the ordinance's sensitive use provision facially invalid under the First Amendment. The majority perceived the ordinance as creating a possibility that, after an application for an adult use permit is filed, but before it is determined, a subsequent sensitive use applicant might obtain a permit and thereby cause denial of the prior adult use application. Describing

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5. Completing its standing inquiry, the Court of Appeals found that Young had suffered a cognizable injury by spending money in the permitting process. Appendix A at 13a.

this as a case of first impression,[6] the majority concluded that, although sufficient alternative sites for the proposed adult use were available, the City nonetheless unreasonably restricted alternative avenues of communication under *Renton* by delegating to private parties the power to decide the fate of applications for adult business permits. Appendix A at 17a-21a. Simi Valley's request for rehearing and rehearing en banc was denied on July 31, 2000. Appendix C at 55a-56a.

REASONS FOR GRANTING THE WRIT

The Court of Appeals majority decision constitutes a radical expansion of the contours of the overbreadth doctrine. This Court has previously permitted a party to challenge an ordinance under the overbreadth doctrine in two types of cases: where an ordinance sweeps too broadly, penalizing a substantial amount of speech that is constitutionally protected; and in the limited situation where a time, place, and manner restriction delegates overly broad discretion to the decisionmaker. In unfettered discretion cases, "every application" of an ordinance creates an impermissible risk of suppression of ideas and every potential applicant is similarly situated — namely, at the mercy of the permitting officer with total discretion. By granting Young standing, the Ninth Circuit has now expanded these limitations to include a third category of cases: whenever a time, place, and manner restriction allegedly infringes upon the speech of parties not before the court. Moreover, whereas this Court

6. The majority noted that all of the previous cases that have defined the parameters of the "reasonable alternative avenues of communication" test have focused on the geographical area or the number of sites available for adult uses, and not on the procedure by which the permit is granted or denied. Appendix A at 16a.

has always limited the overbreadth exception to overbroad substantive prohibitions, it has no proper application to solely procedural provisions of a time, place, and manner restriction. Only remedial action by this Court can correct this unprecedented expansion of judicial authority.

In order to eliminate the *potential* of a sensitive use such as a school, church or youth-oriented business from disqualifying an earlier adult business permit application, the Court of Appeals has required municipalities to prefer adult uses over sensitive uses. In the Ninth Circuit, it is not enough to provide sufficient sites for adult businesses under *Renton*. A municipality must also allow an adult business to effectively exclude a church or other place of worship from the surrounding buffer zone created by a city's adult business ordinance during the permitting process without the adult business itself having received a permit to operate at the chosen location. This is an issue of wide national significance that should be decided by this Court.

The decision by the Court of Appeals underscores the tension between two significant decisions of this Court on the issue of nude dancing and the First Amendment. In *City of Erie v. Pap's A.M.*, 529 U.S. 277, 120 S. Ct. 1382 (2000), this Court held that a municipality can constitutionally ban public nudity in its entirety to combat the same secondary effects which form the basis for the adult use zoning ordinances enacted by the City and examined in *Renton*. As observed by Circuit Judge O'Scannlain in his dissenting opinion, "If municipalities can prohibit nude dancing outright through content-neutral restrictions on conduct . . . they presumably can certainly use their zoning power to achieve the same ultimate effect as a total ban." Appendix A at 38a.

I.

THE NINTH CIRCUIT GROSSLY EXPANDED THE OVERBREADTH EXCEPTION TO NORMAL STANDING REQUIREMENTS BY APPLYING IT TO A PURELY PROCEDURAL ASPECT OF A TIME, PLACE, AND MANNER RESTRICTION

In granting Young standing to challenge Simi Valley's zoning ordinance, the Ninth Circuit has radically expanded the First Amendment "overbreadth" exception to normal standing requirements. In direct conflict with this Court's insistence that the overbreadth doctrine not be defined "so broadly that the exception to ordinary standing requirements would swallow the rule," *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 799 (1984), the Ninth Circuit has stretched the doctrine to confer third-party standing on virtually every putative plaintiff in a First Amendment case. This dramatic expansion of federal court jurisdiction in a legal field of paramount national significance warrants the attention of this Court.

There can be no question in this case that, under normal standing rules, Young had no standing to challenge what the Ninth Circuit dubbed the "sensitive use veto" provision in Simi Valley's zoning ordinance. Because Young's permit application involved a site located less than 500 feet from a pre-existing karate school, Simi Valley rejected his application as violating the ordinance's distance requirements, irrespective of the sensitive use veto (which provided a second independent ground for disqualification).

Nonetheless, the Ninth Circuit granted Young standing to challenge the sensitive use veto by invoking the

overbreadth doctrine. According to the panel opinion, the overbreadth doctrine was triggered because the sensitive use veto rendered Simi Valley's permitting process "difficult and risky" and, thus, people might be "deterred from attempting to obtain an adult use permit." In light of this alleged deterrent effect, the court concluded that the ordinance created a " 'realistic danger that the [ordinance] itself will significantly compromise recognized First Amendment protections of parties not before the Court.' " Appendix A at 12a (quoting *Taxpayers for Vincent*, 466 U.S. at 801).

This ruling flies in the face of this Court's precedents. Under well-established case law, the overbreadth exception to normal standing requirements is limited to two specific circumstances. First, this Court has relaxed standing requirements in cases challenging substantive prohibitions on expression that are so substantially overbroad that their mere existence serves as a deterrent to protected free expression. *E.g.*, *Broadrick v. Oklahoma*, 413 U.S. 601 (1973). Where a statute appears to prohibit both protected and unprotected speech, this Court has allowed a facial challenge even where the challenging party's expressive activity might legitimately be proscribed by a more narrowly drawn law.

The idea behind this aspect of the overbreadth doctrine is straightforward. This Court was concerned specifically with the "chilling effect" that overbroad statutes may have on persons seeking to engage in legitimate expression but who will refrain from such expression "for fear of criminal sanctions provided by a statute susceptible of application to protected expression." *Gooding v. Wilson*, 405 U.S. 518 (1972). The overbreadth doctrine is simply a vehicle for achieving expeditious judicial resolution of the validity of

such statutes. *See also New York v. Ferber*, 458 U.S. 774 (1982); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985).

Second, this Court has relaxed standing rules in cases involving a very specific class of time, place, and manner restriction, specifically where the plaintiff challenges a licensing scheme that vests complete or near complete discretion in a licensing authority. *See, e.g., Lovell v. Griffin*, 303 U.S. 444 (1938); *Saia v. New York*, 334 U.S. 558 (1948); *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750 (1988). Such relaxation has taken two forms. As a threshold matter, "where a licensing statute allegedly vests unbridled discretion in a government official over whether to permit or deny expressive activity, one who is subject to the law may challenge it facially without the necessity of first applying for, and being denied, a license." *City of Lakewood*, 486 U.S. at 755-56.

In addition, this Court has allowed challenges to such "complete discretion" laws to proceed as facial challenges. Thus, this Court allowed the Nationalist Movement to mount a facial challenge to a Forsyth County, Georgia, ordinance that vested discretion over parade permit fees in a Board of Commissioners. As the Court reasoned, a facial challenge was appropriate because "every application" of an ordinance vesting complete permitting discretion in a government body "creates an impermissible risk of suppression of ideas." *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 129 (1992).

At the same time, however, this Court has emphasized that its rulings permitting such anticipatory facial challenges to discretionary permitting schemes "did not involve any

departure from the general rule that a litigant only has standing to vindicate his own constitutional rights." *Taxpayers for Vincent*, 466 U.S. at 796. Indeed, no such departure is necessary. As this Court has recognized, with respect to laws involving excessive discretion in the issuance of permits, every application of such a law is invalid and every prospective applicant is equally disadvantaged by such a law's constitutional infirmity. *Id.* at 797-98.

The Ninth Circuit ruling in the instant case completely ignores this Court's carefully crafted limits on the overbreadth doctrine. As noted above, in the context of challenges to time, place, and manner restrictions (as opposed to substantive prohibitions), this Court has never departed "from the general rule that a litigant only has standing to vindicate his own constitutional rights." *Id.* at 796. By granting Young standing to challenge a provision of Simi Valley's zoning ordinance that did not govern the denial of his permit application, the Ninth Circuit has expanded the overbreadth doctrine to allow a plaintiff third-party standing whenever a time, place, and manner restriction allegedly imposes a burden on the speech of parties not before the court.[7]

The Ninth Circuit justifies its ruling by insisting that Simi Valley's so-called sensitive use veto poses a "realistic danger" of compromising the First Amendment interests of

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7. Importantly, the Ninth Circuit also erred in seeming to characterize Simi Valley's ordinance as an absolute discretion scheme, with that discretion vested in private parties. Unlike an absolute discretion permitting scheme, where every applicant must seek permission from the designated authority, here the possible intercession of private parties into the adult use permitting process is completely speculative and might never occur again.

parties not before the Court. Appendix A at 12a. But virtually every credible First Amendment challenge to a law or regulation involves a danger to the speech interests of non-parties. The Ninth Circuit analysis simply begs the question of when a party substantively unaffected by the provision under challenge should be allowed to raise the rights of non-parties.

This Court has given a clear answer to that question. Under the overbreadth doctrine, such third-party standing is limited to overbroad *substantive* prohibitions, where a non-party may engage in self-censorship rather than risk punishment at the hands of the state.[8] This "chilling effect" rationale for overbreadth standing has never been applied by this Court — and has no proper application — in the context of a purely procedural provision of a time, place, and manner restriction.

Simply put, the Ninth Circuit had no basis for allowing Young to challenge Simi Valley's sensitive use veto. That challenge could easily have waited for a party actually affected by the veto provision. More important, in reaching to grant Young standing to challenge the law, the Ninth Circuit has rewritten the overbreadth doctrine to accomplish precisely what this Court has admonished against: having

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8. Even in the context of substantive prohibitions, the party seeking standing under the overbreadth doctrine is challenging a provision that, if voided, would provide that party (as well as non-parties) relief. The overbreadth doctrine simply allows a party whose conduct could have been proscribed had the legislature acted more carefully to vindicate the rights of parties whose conduct was not subject to any prohibition. Here, a narrowing of the sensitive use veto would provide no relief to Young — whose application was unacceptable regardless.

the overbreadth standing exception swallow the ordinary standing rule. Only remedial action by this Court can correct this gross expansion of judicial authority by the nation's largest court of appeals.

II.

THE COURT OF APPEALS DECISION FORCES MUNICIPALITIES TO PREFER ADULT USES OVER SENSITIVE USES, SUCH AS SCHOOLS, CHURCHES AND YOUTH-ORIENTED BUSINESSES, IN APPLYING THEIR ZONING LAWS

In one important respect, Simi Valley's zoning ordinance presents a situation not addressed in *Renton* and its progeny. Other municipalities which have adopted similar ordinances did so to disperse existing adult businesses. Simi Valley by contrast currently contains no adult businesses and contained none when it adopted its challenged zoning ordinance to regulate the potential influx of adult businesses into the community.

Because Simi Valley was designing and applying a *Renton*-type ordinance for a community with no existing adult uses, it faced a fundamental choice between a permitting process that favored adult uses or one that favored sensitive uses such as schools and churches. As a practical matter, Simi Valley had to decide what would happen when an applicant sought a permit for an adult use. Would the filing of that application effectively preclude new sensitive uses from coming into the buffer zone around the site of the proposed adult use or, alternatively, would Simi Valley continue to provide a buffer around new sensitive uses during the pendency of an adult use application, even if that forced

the adult use applicant to choose an alternative location? Simi Valley chose that latter course — a preference for sensitive uses.

In upholding Young's facial challenge to the so-called sensitive use veto provision, the Court of Appeals has perversely required that Simi Valley and similarly situated municipalities prefer adult uses over sensitive uses. Crucially, the Ninth Circuit did not rule that Simi Valley was not providing a sufficient number of adult business sites. Appendix A at 25a-29a. Instead, the Ninth Circuit ruled that it is not enough to provide sufficient sites for adult businesses under *Renton*. According to the Ninth Circuit, a municipality is also required to give a preference to adult businesses by allowing the mere filing of an adult use permit application to render the buffer zone around the application site an enter at your own peril zone for sensitive uses.

Specifically, it is now lawful in the Ninth Circuit for an adult use applicant to effectively exclude churches, schools, playgrounds and youth-oriented businesses from the surrounding buffer zone created by a city's adult use ordinance during the permitting process. For a few dollars, an adult business can file several permit applications, no matter how obviously deficient under applicable land use law the proposed adult use may be, and, during the review process, effectively preclude sensitive uses from locating within the buffer zone, as these uses would not want to commit to a site near where an adult business might open.[9]

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9. This scenario is no less a possibility than that of a so-called sensitive use veto relied on by the majority. Appendix A at 20a ("Prospective adult business owners still reasonably may fear that another [sensitive use] will crop up every time that they attempt to obtain a permit and thus refrain from applying").

This is an important issue of broad national significance that should be decided by this Court. No reported decision has ever permitted adult businesses a preference in the marketplace, especially not over uses such as youth-oriented businesses, schools and churches. To the contrary, this Court has repeatedly recognized the broad power of local governments to control the basic tenor of their communities through the power to zone. *See, e.g., Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 121 (1982). Yet the Ninth Circuit, despite conceding that Simi Valley's ordinance complied with this Court's *Renton* guidelines for providing an adequate number of adult use sites, has usurped that vital local authority. In so doing, that court has cast into doubt the ability of communities without existing adult businesses to prefer sensitive uses during the process of providing adequate alternatives for the expressive activity attendant to adult businesses. This unwarranted extension of First Amendment protection for adult businesses should be reversed.

III.

THE COURT OF APPEALS OPINION UNDERSCORES THE TENSION BETWEEN THE *RENTON* AND *ERIE* CASES THAT SHOULD BE RESOLVED BY THIS COURT

The majority opinion exemplifies the type of irreconcilable decision that will continue to issue from the Courts of Appeals in determining the constitutionality of statutes regulating public nudity.

In *City of Erie v. Pap's A.M.*, 529 U.S. 277, 120 S. Ct. 1382 (2000), this Court upheld an ordinance banning nudity in public places, the definition of which included enclosed

spaces in buildings open to the general public, including places of entertainment. The ordinance thus had the effect of banning nude erotic dancing. Under *Erie*, a municipality can enact a content-neutral ordinance regulating conduct which has the effect of banning nude dancing entirely.

In *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), this Court upheld an ordinance similar to the one enacted by Simi Valley. The Court noted that "[t]he Renton ordinance, like the one in *American Mini Theatres*, does not ban adult theaters altogether," but merely "circumscribe[s] their choice as to location." *Id.* at 46. In both *Renton* and *American Mini Theatres*, the zoning ordinances were analyzed as time, place, and manner regulations. In his dissent in *Erie*, Justice Stevens noted, "Because time, place, and manner regulations must 'leave open ample alternative channels for communication of information,' a total ban would necessarily fail that test." 120 S. Ct. at 1408 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

Circuit Judge O'Scannlain pointed out this contradiction in his dissenting opinion:

> If municipalities can prohibit nude dancing outright through content-neutral restrictions on conduct . . . , they presumably can certainly use their zoning power to achieve the same ultimate effect as a total ban.

Appendix A at 38a.

In finding the ordinance facially invalid, the majority has created the incongruous situation where a municipality may totally ban the conduct of nude dancing but risks

violating a person's civil rights by enacting zoning laws that *possibly* may have the same effect. The majority brushes aside the principle, reaffirmed by the *Erie* court, that "the government should have sufficient leeway to justify [content-neutral restrictions regulating conduct] based on secondary effects" of such conduct. *Erie*, 120 S. Ct. at 1396.

It simply should not be the case that an ordinance's compliance with the First Amendment depends on the *form* it takes rather than its actual *effect* on purported speech. As noted by Judge O'Scannlain:

> Because *Erie* did not overrule *Renton* — Justice O'Connor's plurality opinion in *Erie* relied upon *Renton* for its analysis — the two decision must be read as consistent with each other (despite the dissent's claim of irreconcilability, *see id.* [120 S. Ct.] at 1407-09 (Stevens, J., dissenting)). When read together, *Erie* and *Renton* establish somewhat different frameworks for evaluating the constitutionality of content-neutral regulations of nude dancing as opposed to other forms of adult entertainment. Under *Erie*, a municipality can enact a content-neutral ordinance banning nude dancing entirely. *See id.* at 1388. Under *Renton*, however, a municipality can enact a content-neutral ordinance regulating adult entertainment only to the extent that the ordinance does not deny an individual "a reasonable opportunity to own and operate an adult theater within the city." 475 U.S. at 54. Thus, after *Erie*, the extent to which cities like Simi Valley may ban or otherwise regulate adult entertainment would appear to depend upon the specific type of entertainment

> being regulated. Although I believe, for the reasons set forth above, that Young's challenge to the City's ordinance fails under *Renton*, I am persuaded that his challenge would indisputably fail if governed by the *Erie* standard.

Appendix A at 39a.

This Court should grant the City's petition in order to resolve the important question of federal law created by the tension between the rules stated in *Erie* and *Renton*.

CONCLUSION

For the foregoing reasons, Simi Valley respectfully requests that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED AND FILED JUNE 20, 2000

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 97-56484
D.C. No. CV 94-08305 WJR

PHILIP YOUNG,

Plaintiff-Appellee,

v.

CITY OF SIMI VALLEY,

Defendant-Appellant.

Appeal from the United States District Court
for the Central District of California
William J. Rea, District Judge, Presiding

Argued and Submitted
April 27, 1999 — Santa Ana, California

Filed June 20, 2000

Before: Warren J. Ferguson, Diarmuid F. O'Scannlain, and A. Wallace Tashima, Circuit Judges.

Appendix A

Opinion by Judge Tashima;
Partial Concurrence and Partial Dissent by
Judge O'Scannlain

* * *

OPINION

TASHIMA, Circuit Judge:

The City of Simi Valley ("Simi Valley" or the "City") appeals from the district court's order declaring its adult business zoning ordinance unconstitutional and granting an injunction barring its enforcement. We must decide two issues: whether a zoning ordinance that allows "sensitive use"[1] establishments to apply for an over-the-counter zoning clearance and disqualify a pending adult use permit is constitutional; and whether the existence of four potential, simultaneously available adult use sites in a city where only one application is pending is sufficient to provide alternative avenues of communication under the test set forth in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). We have jurisdiction under 28 U.S.C. § 1291, and we affirm the

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1. Under the Simi Valley ordinance, "sensitive use" includes any "youth-oriented business" or any "public or private school, park playground, church or other place of worship, or any noncommercial establishment operated by a bona fide religious organization." Simi Valley Mun. Code § 9-1.2003(d); *see also* Simi Valley Mun. Code § 9-1.2002(m). A sensitive use disqualifies an adult use permit application if it is located within either 500 feet or 1,000 feet of the prospective adult use site, depending on the particular sensitive use involved.

district court's judgment that the ordinance is unconstitutional, albeit on a narrower ground.

I. FACTUAL AND PROCEDURAL BACKGROUND

Simi Valley, located approximately 35 miles northwest of Los Angeles, has a population of slightly over 100,000 residents and occupies 34 square miles in area. There has never been an adult business in Simi Valley. In 1978, Simi Valley adopted its first zoning ordinance regulating the location of adult businesses; however, a federal court found the ordinance unconstitutional.[2] Thereafter, in or around 1988, Simi Valley officials began drafting another zoning ordinance to regulate adult businesses within the City.

In late 1992, before a new ordinance was adopted, appellee Philip Young put a $20,000 down payment on a property at 999 Los Angeles Avenue for the purpose of opening an adult business and he subsequently applied for an adult use zoning permit. On January 28, 1993, Young received a zoning clearance from the City, and applied for and received a business tax certificate.

On February 9, the City rescinded Young's zoning clearance and requested additional information to determine whether his proposed use was acceptable. Young submitted the requested information approximately two weeks later. In the interim, however, the City had adopted Ordinance

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2. The reason that the first adult use zoning ordinance was declared unconstitutional is unclear from the record.

No. 791, an emergency ordinance which adopted a moratorium on all adult uses throughout the City. According to the testimony of the City Attorney, the moratorium was motivated, at least in part, by Young's application.

On May 3, 1993, Simi Valley adopted Ordinance No. 796, a permanent zoning scheme regulating all adult businesses.[3] Under the ordinance, no adult business is permitted to locate within 500 feet of any residential zone or youth-oriented business,[4] within 1,000 feet of any other adult business, or within 1,000 feet of any "public or private school, park playground, church or other place of worship, or any noncommercial establishment operated by a bona fide religious organization." Simi Valley Mun. Code § 9-1.2003(d). Additionally, before one may open or expand an adult business, the applicant is required to obtain a special use permit, which may take from several months to a year to obtain. *See* Simi Valley Mun. Code § 9.1-2004.

After the ordinance was passed, approximately 0.5 percent of the land within Simi Valley was available for

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3. Adult businesses within the scope of the ordinance include "adult book stores, adult cabarets, adult hotels and motels, adult massage parlors, adult motion picture arcades, adult motion picture theaters, adult mini-motion picture theaters, adult video stores, model studios, and sexual encounter centers." Simi Valley Mun. Code § 9-1.2003; *see also* Simi Valley Mun. Code § 9-1.2002(a)-(j).

4. A "youth-oriented business" is defined as a business activity which "caters predominantly to on-site patronage by persons under eighteen (18) years of age . . . and which is open for such business not less than twenty-five (25) hours per week." Simi Valley Mun. Code § 9-1.2002(m).

adult business sites. Further, although there were between 35 and 120 potential adult use locations, the City conceded that, at most, only four adult use sites could be available simultaneously because of the 1,000-foot buffer zone requirement between adult establishments.

Because the new ordinance prohibited an adult business at 999 Los Angeles Avenue, Young abandoned his project and, on December 12, 1994, filed the instant lawsuit challenging the ordinance's constitutionality. While the lawsuit progressed, Young searched for an acceptable alternate location for his proposed business. He settled upon 585 East Los Angeles Avenue. Before entering into a lease on the property, however, Young contacted Simi Valley officials to determine whether he would be permitted to open an adult business at that location. The City conducted a preliminary site inspection of the area and determined that there were no incompatible uses under the ordinance at that time. The City Attorney cautioned, however, that a final determination regarding compliance with the ordinance could be made only after specific land development plans were submitted.

Based on this favorable initial response by the City, Young entered into a lease for the property at 585 East Los Angeles Avenue for a monthly rent of $3,174 with the intention of opening an adult theater there. He applied for a special use permit to operate an adult business and he also agreed to stay the lawsuit pending the approval of his application.

After receiving comments from various city agencies, Simi Valley requested that Young provide additional

information, including noise mitigation and traffic studies. Neither of these studies had been required by the original special use permit application, but Young nonetheless submitted the requested information on August 14, 1995. He was informed on September 14 that certain pieces of information were insufficient, and on November 9, Young resubmitted his plans. Throughout the process, Young was required to hire both an outside traffic engineer and a sound engineer. While the total cost of the permitting process is unclear from the record, Young spent at least $45,000 attempting to obtain a permit to operate an adult theater on the 585 East Los Angeles property.

On December 8, 1995, exactly 30 days after Young resubmitted his plans, Simi Valley notified Young that his application was complete,[5] but denied his application because it did not comport with the buffer zone requirements. The City informed Young that the proposed site violated the ordinance in two ways.

First, the proposed site violated the 1,000-foot buffer zone around schools and noncommercial establishments operated by a bona fide religious organization. *See* Simi Valley Mun. Code § 9-1.2003(d). On December 7, 1995, the day before the City deemed Young's application complete, a newly-established religious organization, the Joshua Institute, had filed a zone clearance application to operate an adult bible study class at 665 East Los Angeles Avenue. The Joshua Institute was to meet for Bible study one hour

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5. Under the ordinance, Simi Valley has 30 days after submission to deem an application complete. Once the application is complete, the City has 94 days to act upon the application.

per week, on Thursday mornings from 6:30 to 7:30 a.m., and its space was furnished only with several folding chairs. The City, having concluded that the Institute's application complied with all requirements, granted it a zone clearance the following day, on December 8, 1995.

The Joshua Institute is headed by Norman Walker, President of the Simi Valley Board of Education, Associate Pastor of the First Baptist Church in Thousand Oaks, and an admitted opponent of Young's proposed establishment. Walker testified at trial that he knew where Young intended to open his adult business and believed that opening the Joshua Institute would disqualify Young's adult business permit application.[6]

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6. The dissent suggests that "significant evidence" exists that Walker "had no idea" that a permit to operate the Joshua Institute would stop Young from obtaining a zoning permit. Slip op. at 6549. This suggestion, however, is belied by the record. Walker testified, as follows:

> Q: Did you believe . . . that your facility would disqualify Mr. Young's proposed adult theater?
>
> A: I didn't have any direct knowledge that it would, no.
>
> Q: But you answered my question not directly. You said you had no direct knowledge. I'm asking you for your belief. Did you believe on December 7th, 1995, when you obtained zoning clearance for the Joshua Institute, that that would disqualify Mr. Young's proposed adult theater?

(Cont'd)

Second, a subsequent investigation of the area revealed that a karate school within 500 feet of Young's site was a "youth-oriented" business for purposes of § 9-1.2003(d). The karate school was in existence both when the City Attorney informed Young that no sensitive uses were within the site's buffer zone and when Young first applied for the zoning permit. Although Young had been aware of the karate school's existence, he did not know that it qualified as a youth oriented business, and the City never advised him of that fact at any time after its preliminary investigation of the site. The City informed Young that either the Joshua Institute or the karate studio independently would have prevented him from obtaining a special use permit for that site.[7]

On March 6, 1996, the City Planning Commission rejected Young's application. Over Young's protestations, it ruled that a proposed site's compliance with the buffer zone requirements was to be determined as of the date of the

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(Cont'd)

A: Yes, I did.

Q: Did you believe it?

A: Yes, I did.

Rptr's. Tr., Vol. 4, pp. 39-40.

7. In light of the City's reliance on the two alternative reasons as grounds for refusing to approve Young's special use permit application, the dissent's characterization of the application of the sensitive use veto to Young as "theoretical" and "hypothetical," slip op. at 6546-47, is an inaccurate simplification of the record.

project's approval, rather than as of the date when the application was filed. In any case, the Commission noted that Young's application would have been denied because the karate school was in operation when Young filed his application. Young appealed to the City Council, which affirmed the Planning Commission's decision.

In September 1996, the district court lifted the stay of Young's lawsuit, and Young amended his original complaint. Young conceded that the Simi Valley ordinance was a time, place, and manner restriction and that the City had a substantial interest in enacting an adult business zoning ordinance. Young argued, however, that under the test set forth in *Renton*, 475 U.S. at 46-50, the Simi Valley ordinance does not allow reasonable alternative avenues of communication. Simi Valley countered that its regulation was valid under *Renton*.

The case was tried to a jury in May, 1997, but the jury was unable to reach a verdict and the district court declared a mistrial.

On June 9, 1997, Young filed a renewed motion for judgment as a matter of law. The district court granted the motion based on two grounds. *See Young v. City of Simi Valley*, 977 F. Supp. 1017, 1018 (C.D. Cal. 1997). The district court first concluded that the ordinance was unconstitutional because the de facto veto power given to sensitive use establishments ("sensitive use veto")[8] makes it

8. We use the term "sensitive use veto" to refer to the ability of a sensitive use establishment, established or relocated within an

(Cont'd)

"unreasonably difficult" for an adult use applicant to complete the permit process. *Id.* at 1020. Testimony by a City official revealed that at any point during the application process a sensitive use establishment could apply for and receive an over-the-counter zoning approval and block Young from completing his project. Discussing this feature of the ordinance, the district court stated that "a system whereby third parties can effectively nullify the few areas set aside as 'reasonable alternative avenues' " of communication is unconstitutional. *Id.*

Second, the district court found that four potential sites are not a reasonable number of alternative avenues of communication as a matter of law. *Id.* at 1021-22. The court then "permanently enjoined [Simi Valley] from enforcing its current zoning scheme with respect to the distance and buffer zone requirements currently in effect for adult theaters." *Id.* at 1022.

II. DISCUSSION

We conclude that the challenged permitting scheme for adult businesses in Simi Valley is facially invalid under the First Amendment. The ability of private parties to obtain an over-the-counter zoning permit that effectively blocks an adult use, at *any* time during the lengthy permitting process for adult businesses, deprives a potential adult business

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(Cont'd)
adult use permit applicant's buffer zone after that application has been filed, to disqualify that applicant by obtaining an over-the-counter zoning permit before the adult use permit application process can be completed.

owner of "reasonable alternative avenues of communication" as required by the Supreme Court's holding in *Renton*, 475 U.S. at 50. We do not find, however, that there is an inadequate number of permissible sites for adult businesses in Simi Valley, as a matter of law. The record simply does not demonstrate that four potential sites is insufficient in a city with the particular characteristics of Simi Valley.

A. Standing

Young asserts that the ordinance is invalid both facially and as applied by Simi Valley. Since we conclude that the ordinance is facially invalid, however, we need not reach the issue of whether the statute is unconstitutional as applied to Young. We review the district court's grant of standing de novo. *See Johns v. County of San Diego*, 114 F.3d 874, 876 (9th Cir. 1997).

Under the overbreadth doctrine, a plaintiff may challenge an overly-broad statute or regulation by showing that it may inhibit the First Amendment rights of parties not before the court, even if his own conduct is not protected. *See 4805 Convoy, Inc. v. City of San Diego*, 183 F.3d 1108, 1111 (9th Cir. 1999); *see also Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). The overbreadth doctrine is based on the observation that "the very existence of some broadly written laws has the potential to chill the expressive activity of others not before the court." *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 129; *see also Lind v. Grimmer*, 30 F.3d 1115, 1122 (9th Cir. 1994). Thus, the City's, and the dissent's, contention that Young cannot sustain a challenge to the ordinance based on the sensitive use veto

because of the pre-existing karate studio is mistaken. In order to have standing to bring a facial challenge, Young must demonstrate only that the ordinance "create[s] an unacceptable risk of the suppression of ideas" and that he has suffered an injury. *Nunez v. City of San Diego*, 114 F.3d 935, 949 (9th Cir. 1997) (quoting *Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 947, 965 n.13 (1984)).

Young asserts that people will be deterred from attempting to obtain an adult use permit — and thus engage in a protected activity — because the ordinance makes the process prohibitively difficult and risky. Because, as Young contends, a sensitive use could preempt an adult establishment for *any reason* at *any time* before the approval of the adult use permit, there exists a "realistic danger that the [ordinance] itself will significantly compromise recognized First Amendment protections of parties not before the Court." *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984).

The overbreadth exception to the prudential limits on standing, however, "does not affect the rigid constitutional requirement that plaintiffs must demonstrate an injury in fact to invoke a federal court's jurisdiction." *4805 Convoy*, 183 F.3d at 1112 (quoting *Bordell v. General Elec. Co.*, 922 F.2d 1057, 1061 (2d Cir. 1991)). Rather, the exception only allows those who have suffered some cognizable injury, but whose conduct may not be protected under the First Amendment, to assert the constitutional rights of others.

Here, Young satisfies the injury-in-fact requirement. He has applied for and has been denied an adult use permit twice

in Simi Valley, including once under the challenged ordinance. He spent at least $45,000 and one year attempting to obtain a permit, only to be denied at the last minute. The economic loss that Young has suffered is a cognizable injury and is sufficient to satisfy the Article III standing requirement. *See, e.g., Clinton v. City of New York*, 524 U.S. 417, 432-33 (1998) ("The Court routinely recognizes [ ] economic injury resulting from governmental actions . . . as sufficient to satisfy the Article III 'injury-in-fact' requirement.") (internal quotation marks and citations omitted).

B. Sensitive Use Veto

The Supreme Court has held that the right to open and operate an adult theater featuring topless, exotic or nude dancing is protected by the First Amendment. *See Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981); *see also Kev, Inc. v. Kitsap County*, 793 F.2d 1053, 1058 (9th Cir. 1986) ("Courts have considered topless dancing to be expression, subject to constitutional protection within the free speech and press guarantees of the first and fourteenth amendments."). While local governments have a broad power to zone and control land use for the benefit of their communities, that power must be exercised within constitutional limits. *See Schad*, 452 U.S. at 68 (citing *Moore v. City of East Cleveland*, 431 U.S. 494, 514 (1977)). Those constitutional limits have been defined by the Supreme Court — and refined by the lower courts — in a series of cases in which local zoning ordinances that limited or prohibited adult businesses were challenged. *See Renton*, 475 U.S. 41; *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976);

see also Topanga Press, Inc. v. City of Los Angeles, 989 F.2d 1524 (9th Cir. 1993); *Walnut Properties, Inc. v. City of Whittier*, 861 F.2d 1102 (9th Cir. 1988).

1.

Zoning ordinances that are "designed to combat the undesirable secondary effects" of adult businesses, rather than to regulate the content of the speech itself, are reviewed under the standards applicable to "content neutral" time, place and manner regulations. *Renton*, 475 U.S. at 49; *see also Colacurcio v. City of Kent*, 163 F.3d 545, 551 (9th Cir. 1998). Where an ordinance is "justified without reference to the content of the regulated speech," it does not offend the fundamental principle that the government may not avoid the dissemination of offensive speech merely because it finds that speech unacceptable. *Renton*, 475 U.S. at 48 (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)); *see also American Mini Theatres*, 427 U.S. at 71 n.34.

We agree with the district court and the parties that the *Renton* test applies here. Simi Valley Municipal Code § 9-1.2001 states that the purpose of the ordinance is to avoid "certain objectionable side effects which render such adult businesses incompatible with residential areas, schools, places of worship, and other family and youth-oriented uses." No one disputes that the City's "predominate" intent in passing the ordinance was to "preserve the character of neighborhoods, protect the integrity of public places, and effectively meet the impacts of urbanization upon the quality of life within the City" and not to suppress the expression of

unpopular views. Simi Valley Mun. Code § 9-1.2001; *see Renton*, 475 U.S. at 48.

Under *Renton,* an adult use zoning ordinance that is designed to serve a substantial governmental interest and allows for reasonable alternative avenues of communication is constitutional.[9] *See id.* at 50; *see also Crawford v. Lungren*, 96 F.3d 380, 384 (9th Cir. 1996). Young does not dispute that the City's interest in preserving the quality of urban life is a substantial government interest. Rather, Young challenges the ordinance on the ground that it denies potential adult business owners reasonable alternative avenues of communication under the First Amendment. First, Young asserts that a sensitive use establishment's ability to obtain a zoning clearance within a proposed adult facility's buffer zone after its application is pending, impermissibly chills protected freedom of expression. Second, Young contends that the four locations available under the ordinance are too

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9. The First Amendment right to dance completely nude in public recently has been restricted further by the Supreme Court in *City of Erie v. Pap's A.M.*, 120 S. Ct. 1382 (2000). In *Erie*, the Court upheld an ordinance that completely banned nude dancing in all public places, including businesses open to the public. *See id.* at 1388.

Notably, however, the Court did not overrule *Renton*, and the dissent agrees that, because the Simi Valley ordinance applies to all adult businesses, it is *Renton*, not *Erie*, that controls the outcome of this case. Slip op. at 6552. Our inquiry, therefore, still is limited to whether Simi Valley's ordinance deprives a potential adult business owner of "a reasonable opportunity to own and operate an adult theater within the city," *Renton*, 475 U.S. at 54, notwithstanding the dissent's lengthy speculation of how *Erie* might be applied in a different case.

few to amount to a reasonable number of sites, even assuming that none of the sites were defeated at the last minute by a sensitive use.

The dispositive question when deciding whether an ordinance leaves open adequate alternative avenues of communication is "whether the local government has effectively denied [prospective adult business owners] . . . a reasonable opportunity to open and operate their enterprise within the city." *Renton*, 475 U.S. at 54; *see also Topanga Press*, 989 F.2d at 1529. What constitutes a reasonable opportunity to open and operate an adult theater is a mixed question of fact and law which we review de novo. *See Walnut Properties*, 861 F.2d at 1108.

Whether an ordinance that allows a religious organization, school, or other sensitive use establishment to prevent an adult use, at any time during the permitting process, denies a potential adult business owner a "reasonable opportunity to open and operate" his business is an issue of first impression. All of the previous cases that have defined the contours of the "reasonable alternative avenues of communication" test have focused on the geographical area or the number of sites available for adult uses, and not on the procedure by which the permit is granted or denied.

Importantly, however, the Court in *Renton* did not expressly limit its "reasonableness" inquiry to the number of available sites within a city. *See* 475 U.S. at 53-54. The procedure by which a city dispenses its permits may deprive potential businesses of reasonable alternative avenues of communication in the same way that a paucity of available

sites would. *See Baby Tam & Co. v. City of Las Vegas*, 199 F.3d 1111, 1114 (9th Cir. 2000) ("*Baby Tam II*") (holding ordinance which set no time limit for city to act on adult bookstore's license application unconstitutional); *cf. FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 228 (1990) (recognizing that a lack of procedural safeguards may result in the unconstitutional suppression of protected speech). In order to provide reasonable alternative avenues of communication, a zoning ordinance that limits the ability of an adult business to operate must provide "adequate procedural safeguards necessary to ensure against undue suppression of protected speech." *Baby Tam & Co. v. City of Las Vegas*, 154 F.3d 1097, 1100 (9th Cir. 1998) ("*Baby Tam I*"). While a city may adopt reasonable regulations regarding the zoning of adult theaters, such regulations must not unreasonably restrict or interfere with the right of an adult use applicant to operate within a city, regardless of how that interference is accomplished.

2.

We conclude that the Simi Valley ordinance, as interpreted by the City, denies an adult business owner-applicant a reasonable opportunity to open and operate an adult enterprise in Simi Valley. Significantly, the Simi Valley Planning Commission has ruled that the buffer zone requirement between adult businesses and sensitive uses must be satisfied as of the date of a project's approval, not just as of the application's filing date. It is this interpretation of the ordinance that gives rise to the sensitive use veto. It is, however, unconstitutional for a local government to impose a procedural requirement that delegates to certain favored

private parties the unfettered power to veto, at any time prior to governmental approval and without any standards or reasons, another's right to engage in constitutionally protected freedom of expression. *Cf. FW/PBS*, 493 U.S. at 223 (holding that a licensing scheme for adult businesses that created the risk of arbitrary denials was an unconstitutional prior restraint); *see also J.E. Eubank v. City of Richmond*, 226 U.S. 137, 144-45 (1912) (striking down a zoning ordinance that required the city's Building Committee to establish set-back lines for a given piece of property whenever requested to do so by two-thirds of the adjacent property owners). Thus, the present system, under which private third parties may effectively nullify, for any reason, the few areas in the City set aside for potential adult uses, makes it unreasonably difficult, if not impossible, for an adult use applicant to complete the permit process.

An inquiry into the reasonableness of alternative avenues under *Renton* necessarily must be fact specific. *See, e.g., CLR Corp. v. Henline*, 702 F.2d 637, 639 (6th Cir. 1983) (holding an ordinance unconstitutional, even though it was virtually identical to another constitutional ordinance, because the effect of each ordinance was different in each city). In a city of 100,000, with only four potential simultaneously available sites,[10] and at least one known, active opponent of adult

10. Although we hold that four potential, simultaneously available sites are not inadequate as a matter of law, *see* Part II.C, *infra*, the number of available sites is relevant in deciding whether the sensitive use veto poses a realistic danger that protected speech will be chilled. The fact that so few sites are available makes it far more likely that a person or group of persons could exclude all adult businesses from Simi Valley, if they so desired.

businesses, the heightened risk to establishing an adult business created by the sensitive use veto chills protected speech in an unconstitutional manner.[11]

The City and the dissent contend that the concern over the sensitive use veto is founded on a "hypothetical event" and that there is no evidence to establish a "tangible probability" that a sensitive use establishment will seek to disqualify any proposed adult business. This argument is puzzling since Simi Valley actually issued a disqualifying over-the-counter permit to the Joshua Institute the same day that Young's application was deemed complete. Furthermore, Walker, the head of the Joshua Institute, testified that he believed that the Bible study group would preclude Young's business from opening as planned. Hence, the risk that a sensitive use will veto potential adult business owners and deliberately frustrate their efforts by locating a sensitive use nearby is real and not merely hypothetical.

Moreover, in order for an ordinance to be facially invalid there need only be a "realistic danger that the statute itself

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11. In addition, because Simi Valley has never had an adult use business, any proposed adult business is likely to attract publicity surrounding its permit application and the applicant's opponents can easily find out about the proposed permit and attempt to stop it by applying for an over-the-counter sensitive use permit. Young's application, for example, garnered at least some local publicity. On June 10, 1995, the *Simi Valley Star* ran a two-page article featuring Young's proposed adult business. The article discussed the permitting process, identified the location of the proposed site, and explained that the business could not be located near schools, parks, or churches.

will compromise recognized First Amendment protections of parties not before the Court." *Taxpayers for Vincent*, 466 U.S. at 801. Thus, contrary to the City's and the dissent's contention, it is not dispositive that the karate school was an independent reason for the permit denial in this case. Prospective adult business owners still reasonably may fear that another organization like the Joshua Institute will crop up every time that they attempt to obtain a permit and thus refrain from applying. This is especially true where so few sites are available within the City. Anyone wishing to suppress this form of speech could monitor adult business applications and establish a nearby sensitive use before the adult business' application process had been completed.

Thus, in this case, there is a realistic danger that the ordinance will "compromise recognized First Amendment protections" of those people who wish to operate adult businesses in Simi Valley. *Taxpayers for Vincent*, 466 U.S. at 801. The deterrent effect therefore is both "real and substantial," because at any moment a project can be defeated by a private individual or group who wishes to establish a park, Bible study group, or day care center. *American Mini Theatres*, 427 U.S. at 60.

The City also argues that because the case law does not impose a duty upon governing bodies to ensure the availability of a prospective adult business owner's preferred site, *see Renton*, 475 U.S. at 54, the sensitive use veto must be constitutionally permissible. We reject this contention. In *Renton*, the respondents argued that almost all of the available land under the ordinance already was occupied by existing businesses or was not currently for sale or lease.

See id. at 53. The Court held that potential adult business owners must "fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees." *Id.* at 54. Here, Young is not asking for special treatment. In fact, he already had obtained a lease and was ready to move forward with his project. A potential adult business owner is not on "equal footing" with other businesses, however, when his permit can be defeated after he buys or leases a site, merely because another member of the community disagrees with the content of his speech. This is not the type of market competition to which the Court in *Renton* was referring. Thus, while local governments are not required to assure adult businesses that they will be able to obtain their preferred site at "bargain prices" in order to comply with the First Amendment, they also may not impose a procedural requirement that puts potential adult businesses at a severe disadvantage in the market. *Id.*

3.

Our conclusion that the sensitive use veto in this case is unconstitutional is buttressed by several other lines of cases. For example, the doctrine of prior restraint — an area of law also dealing with freedom of speech under the First Amendment — provides a helpful analogy. "A prior restraint exists when the enjoyment of protected expression is contingent on the approval of government officials." *Baby Tam I*, 154 F.3d at 1100. When an approval process lacks procedural safeguards or is completely discretionary, there is a danger that protected speech will be suppressed impermissibly because of the government official's, or, as here, a delegated private party's, distaste for the content of

the speech. *See FW/PBS*, 493 U.S. at 226. Thus, a licensing scheme regulating adult entertainment must contain at least two procedural safeguards in order to be constitutional. *See 4805 Convoy*, 183 F.3d at 1113. First, it must specify a reasonable time period in which the decision whether to issue the license must be made. Second, it must provide for prompt judicial review. *See id.*

The Simi Valley ordinance contains both of the aforementioned safeguards and Simi Valley officials have almost no discretion to deny a permit after the application is complete and the requirements are met. *See* Simi Valley Mun. Code §§ 9-1.1103 (as amended); 9-1.2004. In this way, it is not an unconstitutional prior restraint. Rather, the ordinance delegates that discretion to private parties who may defeat a proposed adult business permit and effectuate a complete ban on certain protected forms of expression. We hold that a city cannot accomplish through private parties that which it is forbidden to do directly under the First Amendment — namely, block the establishment of adult businesses in Simi Valley. *See Rutan v. Republican Party*, 497 U.S. 62, 77-78 (1990) (stating that "[w]hat the First Amendment precludes the government from commanding directly, it also precludes the government from accomplishing indirectly").

A similar statute involving a private party veto was struck down pursuant to the Establishment Clause in *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982). In *Larkin*, the Supreme Court held unconstitutional a Massachusetts statute that gave churches and schools the power effectively to veto applications for liquor licenses within a 500-foot radius of the church or school. Although the challenge in *Larkin*

concerned the Establishment Clause rather than the Speech Clause, the underlying problem in both cases is the same.

The Court in *Larkin* was concerned that the churches' power under the statute was "standardless, calling for no reasons, findings, or reasoned conclusions." *Id.* at 125. Similarly, Simi Valley has given an implicit power to any potential sensitive use, perhaps impermissibly motivated by the desire to keep the city free of this form of speech, to veto an adult establishment.[12] Although *Larkin* is distinguishable because the churches in that case had an explicit veto power, the record in this case demonstrates that it is relatively easy for certain types of sensitive uses to obtain over-the-counter permits and, thus, effectively veto the prospective use.

Finally, courts have been concerned in contexts outside the First Amendment about local governments' attempts to delegate to private landowners the power to determine how another private party may use his or her land "uncontrolled by any standard or rule prescribed by legislative action." *Geo-Tech Reclamation Indus., Inc. v. Hamrick*, 886 F.2d 662, 665 (4th Cir. 1989) (holding unconstitutional a statute that gave local residents de facto veto power over the landfill permitting process) (quoting *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928) (holding unconstitutional a zoning ordinance that gave certain landowners the unlimited right to prevent a trustee from using its land for a proposed home)); *see also Eubank*, 226 U.S.

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12. As in *Larkin*, there also is a substantial risk that if an adult business ever opens in Simi Valley, subsequent applicants might be frustrated by those who desire to restrain competition.

137 (striking down statute that allowed 2/3 of property owners to direct street committee to establish a building line on other's property). Each of those cases held that the delegation of power to private individuals to decide what others could do with their land was "repugnant to the due process clause." *Roberge*, 278 U.S. at 122.

The major concern in these cases was that administrative decision-making would be "subservient to selfish or arbitrary motivations or the whims of local taste." *Geo-Tech*, 886 F.2d at 666; *see also Roberge*, 278 U.S. at 122. Here, the concern is even greater for two reasons. First, unlike in *Roberge*, *Eubank* and *Geo-Tech*, the delegation here infringes on others' right to engage in a fundamental First Amendment activity. *See Schad*, 452 U.S. at 65; *Kev*, 793 F.2d at 1058. The ability to open a landfill or build one's house to certain specifications are not forms of expression protected by the Constitution in the same way that freedom of expression is protected. Second, because the protected activity in this case is extremely controversial, there exists an even greater risk that private parties will use their power to block adult uses for the purpose of suppressing this speech. All of these cases lend support to the conclusion that by giving private parties the right to control the content of speech with respect to public zoning laws, Simi Valley has unreasonably restricted alternative avenues of communication under *Renton*.

We therefore hold that the sensitive use veto provision of the Simi Valley ordinance is unconstitutional on its face.

C. Number of Sites

We now turn to the issue of whether the number of simultaneously available sites under the ordinance is sufficient to allow for "reasonable alternative avenues of communication." *Renton*, 475 U.S. at 50. The district court held that, "as a matter of general law," four possible simultaneous sites "simply does not amount to a reasonable number of alternative means of communication" to satisfy the test in *Renton*.[13] *Young*, 977 F. Supp. at 1022. The court then enjoined Simi Valley from enforcing the buffer zone requirements contained in its adult use zoning scheme. *Id.* This holding was erroneous. While recognizing that *Renton* requires a "case by case analysis," the district court did not perform a fact-specific inquiry to determine whether the number of potential sites is reasonable, given the particular characteristics of Simi Valley, including its size and make-

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13. There is some disagreement regarding the relevant number of sites available for adult businesses. There are presently a total of 35-120 sites where an adult business potentially could locate in Simi Valley. Because of the buffer zone requirement that each adult business must be at least 1,000 feet from another, however, only three or four adult use sites are simultaneously available under the ordinance.

Both *Topanga Press* and *Walnut Properties* emphasize that it is appropriate to examine the number of adult businesses that can simultaneously operate, rather than the number of different sites at which any one adult business could locate, assuming that there were no others in existence. *See Topanga Press*, 989 F.2d at 1533; *Walnut Properties*, 861 F.2d at 1108-09. For purposes of this appeal, we will assume, as did the district court, that there are four simultaneously available sites for adult businesses.

up, as required by *Renton*. *Id.* at 1019; *see, e.g.*, *CLR Corp.*, 702 F.2d at 639; *see also University Books & Videos, Inc. v. Metropolitan Dade County*, 33 F. Supp.2d 1364, 1371 (S.D. Fla. 1999) (noting that reviewing court must "determine whether the number of sites that potentially could exist under the ordinance is reasonable, given the characteristics of the city or county being regulated").

Because there are no current adult businesses in Simi Valley and the City has never had an adult use applicant other than Young, we think it is premature to rule, as a matter of law, that the number of sites at which an adult business could operate is insufficient. While we recognize that the lack of demand may be correlated to the chilling effect of the ordinance as written, it is unclear whether the deletion of the sensitive use veto provision will cause the demand for adult businesses in Simi Valley to rise. The factual record is devoid of any evidence that the number or location of potential, simultaneously available sites, rather than the sensitive use veto provision, has denied reasonable avenues of communication for those who wish to engage in protected speech of the type regulated by the ordinance.

Since *Renton*, this court has twice held local zoning ordinances unconstitutional because they did not provide sufficient alternative sites for adult businesses to locate. *See Topanga Press*, 989 F.2d 1524; *Walnut Properties*, 861 F.2d 1102. The court below relied almost exclusively on *Walnut Properties*, in which we invalidated a Whittier, California, ordinance that prohibited the establishment of all but three adult business sites throughout the city. 861 F.2d at 1108. Without extended analysis, the district court

noted that "[t]he circumstances in the instant case are remarkably similar" to those in *Walnut Properties*. *Young*, 977 F. Supp. at 1022. The district court only compared the number of sites available under the Whittier and Simi Valley ordinances. *See id.* ("The fact that there may be four sites which can exist simultaneously in the instant case as opposed to three is immaterial, given the Ninth Circuit's finding that three sites in the City of Whittier amounted to a 'glaring' constitutional violation."). The circumstances in *Walnut Properties*, however, are quite different from the facts in this case.

First, at the time the Whittier ordinance was passed, the city had 13 adult businesses located within its boundaries, only three of which could continue operating in the city under the new ordinance. *Id.* at 1104, 1108. Second, enforcement of the ordinance in *Walnut Properties* would have forced the closure of the only adult theater then existing in Whittier, with no definite prospect of a place to relocate. *Id.* at 1110. It was on the basis of these particular facts that the court held "the paucity of alternative sites is glaring." *Id.* at 1109.

Conversely, in the present case, there is no evidence that more than four adult businesses would be opened in Simi Valley even in the absence of any adult use zoning regulations. In fact, Young is the only person ever to have applied for a permit to open an adult business in the City's history. Data regarding the number of sites available for adult use is meaningless without a contextual basis for determining whether that number is sufficient for that particular locale. *Walnut Properties* does not stand for the proposition that a zoning ordinance which allows only three, or even four,

sites for adult use to exist simultaneously is per se unconstitutional, as the district court's order suggests.

Nor does *Topanga Press* aid Young's case. There, we invalidated a Los Angeles adult business ordinance where the total number of adult businesses that could co-exist was fewer than the number of adult businesses already operating at the time the ordinance was enacted. *See* 989 F.2d at 1532-33. Of the existing 102 businesses in Los Angeles, all but one would have had to relocate under the new ordinance. *See id.* Without so holding, we assumed that the relevant inquiry was whether the number of locations left available for adult businesses was greater than the demand for those businesses. *See id.* This "supply and demand" analysis also has been employed by other circuits in determining the adequacy of alternative avenues of communication. *See Woodall v. City of El Paso*, 49 F.3d 1120, 1126 (5th Cir. 1995) ("Adult [b]usinesses had to show that the areas left open to them were inadequate to satisfy the demand for adult business locations."); *Buzzetti v. City of New York*, 140 F.3d 134, 140 (2d Cir. 1998) (finding an ordinance constitutional that allowed for the operation of approximately 500 adult businesses where there were fewer than 200 in existence).

We decline, however, to adopt a bright line rule that an ordinance is constitutional when the number of locations available for such businesses equals or exceeds the number of existing adult businesses. This "supply and demand" analysis is insufficient to account for the chilling effect that an adult use zoning ordinance may have on prospective business owners. This point is especially salient in the present case where another feature of the ordinance may deter

business owners from applying for permits, thus artificially curtailing the demand. Rather, supply and demand should be only one of several factors that a court considers when determining whether an adult business has a "reasonable opportunity to open and operate" in a particular city. *Topanga Press*, 989 F.2d at 1529. A court should also look to a variety of other factors including, but not limited to, the percentage of available acreage theoretically available to adult businesses, the number of sites potentially available in relation to the population, "community needs, the incidence of [adult businesses] in other comparable communities, [and] the goals of the city plan." *International Food & Beverage Sys. v. City of Fort Lauderdale*, 794 F.2d 1520, 1526 (11th Cir. 1986) ; *see also 3570 East Foothill Blvd., Inc. v. City of Pasadena*, 980 F. Supp. 329, 341 (C.D. Cal. 1997) .

In this appeal, Young does not argue that any of the enumerated factors weighs in favor of a finding that there is no "reasonable opportunity to open and operate" an adult business in Simi Valley. *Renton*, 475 U.S. at 54. Rather, his claim rests primarily on the sensitive use veto provision, which we agree is unconstitutional. Given the history of scant demand, and the lack of evidence that others wish to open an adult business in Simi Valley, we cannot say, on this record, that four, simultaneously available sites are insufficient, as a matter of law, to provide reasonable alternative avenues of expression under *Renton*.[14]

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14. This is not to say that four simultaneously available sites will not be inadequate in the future when circumstances may be different. That case, however, is not before us today.

III. CONCLUSION

Because we agree with the district court's holding that the ordinance's sensitive use veto provision is unconstitutional, we affirm the judgment in favor of Young. The permanent injunction, however, must be vacated and refashioned. The district court permanently enjoined Simi Valley "from enforcing its current zoning scheme with respect to the distance and buffer requirement currently in effect for adult theaters." *Young*, 977 F. Supp. at 1022. In light of the fact that we have invalidated only the sensitive use veto provision of the ordinance, and not its distance and buffer requirements, the injunction must be vacated as overbroad. On remand, the injunction should be narrowed so that Simi Valley is permanently enjoined from enforcing only the sensitive use veto provision of the ordinance. We remand to the district court for further proceedings in light of this opinion. Young shall recover his costs on appeal from Simi Valley.

AFFIRMED, injunction VACATED, and REMANDED.

Appendix A

O'SCANNLAIN, Circuit Judge, concurring in part and dissenting in part:

The City of Simi Valley enacted a reasonable zoning ordinance regulating the location of adult businesses. Philip Young, who was denied a permit to open a nude dancing club in a shopping center, challenged the ordinance on First Amendment grounds. A jury that heard Young's claims unanimously concluded that the ordinance, as applied by Simi Valley officials in this case, did not violate Young's First Amendment rights.

The jury was, however, unable to reach a decision as to whether the ordinance as a general matter effectively denies persons a reasonable opportunity to own and to operate adult businesses in Simi Valley. Accordingly, no verdict was rendered and the district court declared a mistrial. The district court then granted Young judgment as a matter of law, finding the City's ordinance unconstitutional both on its face and as applied. *See Young v. City of Simi Valley*, 977 F. Supp. 1017, 1022 (C.D. Cal. 1997).

The court now sustains Young's constitutional challenge to the "sensitive use" provision of Simi Valley's ordinance, which prohibits the opening of adult businesses near certain sensitive uses such as youth-oriented businesses, schools, and churches. Based on the theoretical possibility that a sensitive use might apply for a zoning permit and disqualify a pending application for an adult use located nearby, the court concludes that the ordinance gives private parties a so-called "sensitive use veto" over the opening of adult businesses in Simi Valley. Taking this hypothetical and

running with it, the court declares the sensitive use provision unconstitutional on its face. The majority reaches this conclusion even though there is no dispute that the provision *was not applied unconstitutionally* against Young, whose own attempt to secure an adult use permit was in any event precluded by a preexisting sensitive use — a youth-oriented karate studio located in close proximity to Young's proposed site for a nude dance establishment.

As a plaintiff raising a facial challenge, Young bears "a heavy burden" in advancing his claim. *National Endowment for the Arts v. Finley*, 524 U.S. 569, 580 (1998) (internal quotation marks omitted). As the Supreme Court has recently reminded us, "[f]acial invalidation 'is, manifestly, strong medicine' that 'has been employed by the Court sparingly and only as a last resort.' " *Id.* (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973)); *see also Los Angeles Police Department v. United Reporting Publishing Corp.*, 120 S. Ct. 483, 489-90 (1999). Because I cannot agree with the court's facial invalidation of Simi Valley's ordinance, I must respectfully dissent.

I

The district court struck down Simi Valley's zoning ordinance on two grounds. Neither constitutes an adequate basis for holding the ordinance unconstitutional.

A

The district court held that the ordinance's sensitive use provision unconstitutionally gives such uses a de facto veto

power over adult business permit applications. The majority agrees, finding the provision facially invalid for failing to provide would-be adult business owners with "reasonable alternative avenues of communication" as required under *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50 (1986).

Under the *Renton* test, Simi Valley's ordinance is constitutional, as long as it "is designed to serve a substantial government interest and allows for reasonable alternative avenues of communication." *Id.* at 50. Young concedes that the ordinance is designed to serve a substantial government interest, namely, Simi Valley's strong interest in "combat[ing] the undesirable secondary effects" of adult businesses. *Id.* at 49. The only issue in this appeal, then, is whether the ordinance "effectively deni[es] [Young] a reasonable opportunity to open and operate an adult [business] within the city." *Id.* at 54.

The district court concluded that the theoretical possibility that a sensitive use might act to disqualify Young's application *in itself* renders the ordinance unconstitutional by "mak[ing] it unreasonably difficult, if not impossible, for an adult usage applicant to complete the permit process." 977 F. Supp. 1017, 1020 (C.D. Cal. 1997). The majority apparently agrees. *See* maj. op. at 6536.

The possibility that a sensitive use might attempt to exercise a de facto veto power over adult business applications does exist; how this deprives Young of a reasonable opportunity to open an adult business, however, is not apparent. Under the majority's reasoning, the mere

potential for an ordinance to be applied in an unconstitutional manner renders the ordinance altogether unconstitutional. Under such a theory, almost any adult business zoning ordinance—including the one upheld in *Renton* —would be unconstitutional. For example, an ordinance that left half of a city's space available to adult businesses and did not contain any buffer zone requirements could still be attacked based on the possibility that a sensitive use (or the city itself) could purchase all property zoned for adult businesses, leaving such businesses without any available properties at which to locate and thus depriving them of a reasonable opportunity to operate an adult business. Such a theory is untenable in light of *Renton*, where the Supreme Court reversed this court to uphold the City of Renton's ordinance as constitutional—without pausing to speculate about possible scenarios in which the ordinance might be applied unconstitutionally.

Upholding the facial constitutionality of the sensitive use provision would not place the ordinance beyond constitutional scrutiny. The provision would still be fully subject to constitutional challenge on an "as applied" basis. In this case, for example, a reasonable jury *could* have found a high likelihood that a sensitive use would act to disqualify a future permit application by Young—even though the jury that *did* hear the case apparently did not do so. At trial Young introduced evidence from which it might be inferred that the Joshua Institute was a sham opened by Norman Walker to disqualify Young's application. Based on this circumstantial evidence, a jury could have believed that Walker would act similarly with respect to Young's future adult business permit applications.

This is not, however, the only reasonable conclusion to be drawn on the evidence. Significant evidence in the record — of a direct rather than circumstantial nature — points in the opposite direction. For instance, Walker testified that the opening of the Bible study class had nothing to do with Young's permit application; that any interaction between the Joshua Institute's application for a zoning permit and Young's application was "coincidental" and "unintentional"; and that Walker "had no idea," at the time that the Joshua Institute applied for a zoning permit, "that the effect of what [the Institute] did could stop Mr. Young" from obtaining a zoning permit for his proposed adult theater. Furthermore, the proposed location of Young's adult business was in any case already disqualified by the presence of a nearby youth-oriented business. In light of this evidence, it is not surprising that the jury found that the ordinance had not been applied unconstitutionally against Young.

In sum, the likelihood of a sensitive use acting to manipulate Simi Valley's zoning ordinances is a factual question for a jury to decide. This determination should be made on a case-by-case basis, in light of the facts and circumstances surrounding a particular adult use permit application. The district court erred in finding the ordinance facially unconstitutional and enjoining its enforcement.

B

The district court struck down the ordinance on another ground. Under the buffer zone requirements of the ordinance, approximately four potential adult use sites exist simultaneously in Simi Valley — a city in which only one

application for an adult use is pending. The district court held, as a matter of law, that four possible sites "simply does not amount to a reasonable number of alternative means of communication." 977 F. Supp. at 1022. As the majority points out, *see* maj. op. at 6541-42, the district court reached this conclusion without conducting the fact-specific inquiry into reasonableness required under *Renton*.

I agree with the majority that the district court's holding on this issue was erroneous. I would, however, proceed one step further. In *Topanga Press, Inc. v. City of Los Angeles*, 989 F.2d 1524, 1532-33 (9th Cir. 1993), we strongly suggested (but did not explicitly hold) that the constitutionality of an ordinance like Simi Valley's can be determined by comparing the supply of locations available for adult businesses to the demand for such sites. Based on the *Topanga Press* analysis, I would expressly hold that, as a matter of law, an adult business zoning ordinance violates the First Amendment if, and only if, the ordinance restricts the number of sites available to adult businesses below the demand for such properties. Such a rule has already been explicitly adopted by the Fifth Circuit, *see Woodall v. City of El Paso*, 49 F.3d 1120, 1126-27 (5th Cir. 1995), and it finds support in the case law of other circuits as well, *see, e.g.*, *Buzzetti v. City of New York*, 140 F.3d 134, 140-41 (2d Cir. 1998); *Alexander v. City of Minneapolis*, 928 F.2d 278, 283-84 (8th Cir. 1991). This rule provides a sensible, workable test for conducting what might otherwise be an unwieldy (and arguably standardless) inquiry into First Amendment reasonableness under *Renton*.

The majority expressly declines to adopt such a rule, reasoning that " 'supply and demand' analysis is insufficient to account for the chilling effect that an adult use zoning ordinance may have on prospective business owners." Maj. op. at 6544. While the majority's concerns are legitimate, I simply fail to see how an individual can claim that he has been denied a reasonable opportunity to open an adult business as long as there exists a site within the municipality available for his business. Under *Renton*, of course, the aspiring operator of an adult establishment has no right to his preferred business location within the city. Regulating the location of certain types of businesses is, after all, "the essence of zoning." *Renton*, 475 U.S. at 54.

Young is the only individual who has ever sought to establish an adult business in Simi Valley. The number of sites available in the City for such businesses exceeds the demand for such sites (by a multiple of three to four). The Supreme Court's decision in *Renton*, the decisions of our sister circuits, and common sense all suggest that the number of available locations is reasonable as a matter of law.

II

Subsequent to oral argument in this case, the Supreme Court decided *City of Erie v. Pap's A.M.*, 120 S. Ct. 1382 (Mar. 29, 2000). The city of Erie, Pennsylvania, enacted an ordinance prohibiting nudity in public places. Because the ordinance's definition of "public place" included "all buildings and enclosed places owned by or open to the general public, including . . . places of entertainment," the

the effect of banning nude erotic dancing. *Id.* at 1387-88 (quoting Erie, Pa., Code art. 711 (1994)).[1]

Although the members of the Court divided as to their reasoning, a majority voted to uphold the ordinance as "a content-neutral regulation that satisfies the four-part test of *United States v. O'Brien*, 391 U.S. 367 (1968)." 120 S. Ct. at 1388. Under *Erie*, then, municipalities have the right to ban nude dancing entirely if they were to choose to do so in an effort to combat the negative secondary effects of adult entertainment establishments. If municipalities can prohibit nude dancing outright through content-neutral restrictions on conduct aimed at fighting "crime and the other deleterious effects caused by the presence of [an adult] establishment in the neighborhood," they presumably can certainly use their zoning power to achieve the same ultimate effect as a total ban. *Id.* at 1393 (O'Connor, J.) (plurality opinion).

In light of evidence in the record suggesting that Young would still seek to present erotic strip tease dancing at his proposed adult entertainment establishment, *Erie* does not control this case. It does, however, have important implications for the constitutionality of adult use zoning ordinances.

Because *Erie* did not overrule *Renton* — Justice O'Connor's plurality opinion in *Erie* relied upon *Renton* for its analysis — the two decisions must be read as consistent with each other (despite the dissent's claim of irreconcilability,

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1. "To comply with the ordinance, . . . dancers must wear, at a minimum, 'pasties' and a 'G-string.' " 120 S. Ct. at 1388.

see id. at 1407-09 (Stevens, J., dissenting)). When read together, *Erie* and *Renton* establish somewhat different frameworks for evaluating the constitutionality of content-neutral regulations of nude dancing as opposed to other forms of adult entertainment. Under *Erie*, a municipality can enact a content-neutral ordinance banning nude dancing entirely. *See id.* at 1388. Under *Renton*, however, a municipality can enact a content-neutral ordinance regulating adult entertainment only to the extent that the ordinance does not deny an individual "a reasonable opportunity to own and operate an adult theater within the city." 475 U.S. at 54. Thus, after *Erie*, the extent to which cities like Simi Valley may ban or otherwise regulate adult entertainment would appear to depend upon the specific type of entertainment being regulated. Although I believe, for the reasons set forth above, that Young's challenge to the City's ordinance fails under *Renton*, I am persuaded that his challenge would indisputably fail if governed by the *Erie* standard.

In sum, the Supreme Court's recent decision in *Erie* reaffirms the important principle that "the government should have sufficient leeway to justify [content-neutral restrictions regulating conduct] based on secondary effects" of such conduct. *Id.* at 1396. The City would do well to consider both the holding and reasoning of *Erie* carefully in any attempt to refashion its ordinance in the wake of today's decision.

III

Simi Valley's adult business zoning ordinance allows for "reasonable alternative avenues of communication" and

does not offend First Amendment standards. Although its sensitive use provision raises constitutional concerns and may be subject to challenge on an "as applied" basis, it is not unconstitutional on its face. Furthermore, as the majority recognizes, the ordinance's distance and buffer requirements undoubtedly pass constitutional muster. I would reverse and remand for vacation of the injunction in its entirety.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA RE PLAINTIFF PHILIP YOUNG'S MOTION FOR JUDGMENT GRANTING DECLARATORY AND INJUNCTIVE RELIEF DATED AND FILED AUGUST 27, 1997

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 94-8305 WJR (AJWx)

PHILIP YOUNG,

Plaintiff,

vs.

CITY OF SIMI VALLEY, a Municipal Corporation,

Defendant.

ORDER RE: PLAINTIFF PHILIP YOUNG'S MOTION FOR JUDGMENT GRANTING DECLARATORY AND INJUNCTIVE RELIEF.

Plaintiff's motion for judgment granting declaratory and injunctive relief was filed on June 9, 1997, and oral argument was heard on July 21, 1997. After having considered the oral argument, and reviewed the papers submitted in support of and in opposition to the foregoing motion, the file in this case, and the applicable authorities, the Court hereby GRANTS plaintiff's motion for judgment granting declaratory and injunctive relief.

Appendix B

DISCUSSION

A. Procedural Basis for the Instant Motion.

The instant case was tried by a jury on May 13, 14, 15 and 20, 1997. At the close of the presentation of all evidence on May 20, 1997, Plaintiff filed a motion under Rule 50 for judgment as a matter of law. The Court denied the motion on May 21, 1997, indicating that it wished for the question to go to the jury at that time.

The jury was instructed on May 21, 1997, and deliberated through part of May 23, 1997. At the conclusion of its deliberations, the jury indicated that it had answered two of three special interrogatories, but that it was unable to answer all three interrogatories. Accordingly, it indicated that it was unable to reach a verdict. Hence, no verdict was rendered and the Court declared a mistrial.

On June 9, 1997, plaintiff Philip Young filed the instant motion, renewing his request for judgment as a matter of law. Under Rule 50(b) of the Federal Rules of Civil Procedure, such post-trial renewal of a motion for judgment as a matter of law is appropriate, whether or not a verdict has been rendered. Specifically, the rule states:

> If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may

renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment . . . . In ruling on a renewed motion, the court may:

(1) if a verdict was returned:

(A) allow the judgment to stand,

(B) order a new trial, or

(C) direct entry of judgment as a matter of law, or

(2) if no verdict was returned;

(A) order a new trial, or

(B) direct entry of judgment as a matter of law.

Fed. R. Civ. P. 50(b).

Hence, the instant motion, which essentially serves to renew plaintiff's motion for judgment as a matter of law made at the close of evidence, is procedurally appropriate. Although the Court, at the close of evidence, indicated that it wished to allow the jury to attempt to resolve the issues raised, the Court now addresses the legal issues raised by the instant motion for judgment as a matter of law.

Appendix B

B. Plaintiff Has Standing to Bring the Instant Motion.

Defendant argues that plaintiff has no standing to bring the instant motion, as plaintiff made clear at trial that, given the current system, he has no intention of reapplying to open a nude dancing facility in the City of Simi Valley. Even given these facts, defendant's argument is not well taken. In fact, the instant case presents precisely the type of "chilling effect" which courts have made clear *is* sufficient for purposes of bringing a First Amendment lawsuit.

Where a complainant is "either presently *or prospectively* subject to the regulations, proscriptions, or compulsions that he [is] challenging" under the First Amendment, then standing is appropriate. *Laird v. Tatum*, 408 U.S. 1, 11 (1972) (emphasis added). *See also Penny Saver Publications v. Village of Hazel Christ*, 905 F.2d 150, 154 (9th Cir. 1990). Indeed, this is clearly a case in which the deterrent effect on legitimate expression is "both real and substantial." *See Young v. American Mini Theatres*, 427 U.S. 50, 60 (1976), *citing Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975). Here, Mr. Young sought twice to apply for a permit to open a nude dancing facility in Simi Valley. On both occasions, Mr. Young was unsuccessful, based upon the failure of his respective locations to comply with the subject ordinances. Furthermore, Mr. Young specifically testified that, given his previously futile efforts and the time and money invested in these earlier efforts, he would not consider reapplying for a permit so long as the current system remains in effect in Simi Valley. This presents a classic case of an individual who is deterred from exercising his First Amendment rights

in a "real and substantial" way. Hence, Mr. Young clearly has standing to challenge the instant ordinance.

C. The Instant Ordinance is Unconstitutional as a Matter of Law.

1. Standard for Evaluating "Content Neutral" Zoning Regulations Restricting Non-Obscene Adult Entertainment.

"Courts have considered topless dancing to be expression, subject to protection within the free speech and press guarantees of the first and fourteenth amendments." *Kev, Inc. v. Kitsap County*, 793 F.2d 1053, 1058 (9th Cir. 1986). *See also, e.g., Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 65 (1981).

City ordinances such as the one at issue here, which do not ban topless dancing altogether, but rather restrict the areas in which topless dancing may exist, have been analyzed as "time, place and manner" regulations. *See Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46 (1986). This is particularly so where, as here, an ordinance is justified on the basis of alleged "secondary effects" of topless dancing establishments, such as increased crime and prostitution. *Renton*, 475 U.S. at 49; *Kev*, 793 F.2d at 1059.

"Time, place and manner" regulations pass constitutional muster if (1) they are designed to serve a substantial governmental interest and (2) they allow for "reasonable alternative avenues of communication." *Renton*, 475 U.S. at 50; *Kev*, 793 F.2d at 1058.

Appendix B

2. Reasonable Alternative Avenues of Communication.

In the instant motion, plaintiff does not challenge the "substantial governmental interest" underlying the ordinance. Rather, plaintiff's challenge essentially speaks to the issue of "reasonable alternative avenues of communication." *See infra, citing Renton*, 475 U.S. at 50. Specifically, plaintiff asserts that two primary elements render the system invalid for failure to provide reasonable alternative means of speech. First, plaintiff asserts that a "sensitive use" essentially has the power, at any time during the lengthy permit process, to obtain an over the counter zoning clearance within a distance prohibitively close to the proposed adult facility, thus effectively "knocking out" the applied for location as a permissible area for an adult facility. This, argues plaintiff, provides "sensitive uses," such as churches and youth-oriented businesses, with a de facto veto over proposed nude dancing facilities. Second, plaintiff asserts that the number of locations which would be permissible under the ordinance is simply too small to amount to a "reasonable" number of alternative sites, even assuming that none of the sites were to be "knocked out" at the last minute by a sensitive use.

The Court agrees with plaintiff. As to the latter issue, although there is no constitutional "minimum" number of sites as a matter of general law, it is appropriate, on a case by case basis, to determine whether an unreasonably low number of sites exists in a given area. In this instance, the Court finds that the subject ordinance leaves open an unreasonably, and hence, unconstitutionally low number of alternative locations. Although this in itself would be a sufficient basis upon which to enjoin the ordinance, the Court

will also address the former issue, at least within the factual framework involving the paucity of alternative locations here available. As to the former issue, the Court agrees that this is essentially an issue of first impression, as no Ninth Circuit or Supreme Court authority speaks directly to the constitutionality of a scheme by which a school, church, or other "sensitive interest" can de facto "knock out" a location subsequent to a permit application by obtaining its own zoning clearance. Nonetheless, the Court finds that the effect of this practice, at least where the practice is combined with a paucity of locations as is the case here, is such as to effectively preclude "reasonable alternative means of communication".

a. Ability of Conflicting Uses to "Knock Out" a Location at Any Stage of the Permit Process.

Defendant does not dispute that, under the current system, a party seeking to open a nude dancing facility must apply for a special use permit, and that obtaining a special use permit necessarily requires a finding that the prescribed distance requirements from certain "sensitive uses," and from other adult facilities are complied with. Defendant further does not dispute that a "sensitive use", such as a religious organization, can theoretically apply for and obtain an over the counter permit as late as the last day of the permit process, and that such a successful application would effectively "knock out" the pending adult usage application if the latter application would be located within a prohibitively close range to the sensitive usage.

Although defendant does not dispute these facts, defendant does argue that there is no case on point which

prohibits such a process. Although defendant appears to be correct in noting that the instant question is one of first impression, the Court does not agree that Simi Valley's process thus is necessarily constitutional. To the contrary, the authority which does exist as to the general question of "reasonable alternative avenues for communication" leads us to conclude that a system whereby third parties can effectively nullify the few areas set aside as "reasonable alternative avenues," at least where there is such a paucity of alternative sites as exists in the instant case, makes it unreasonably difficult, if not impossible, for an adult usage applicant to complete the permit process, and thus is unconstitutional.

The crux of our reasoning lies in the meaning which has been attributed to the term, "reasonable alternative avenues of communication." In *Topanga Press, Inc. v. City of Los Angeles*, 989 F.2d 1524, 1529 (9th Cir. 1993), the Ninth Circuit focused the inquiry as follows: "The test for determining whether the Adult Businesses' First Amendment rights are threatened is whether a local government has 'effectively den[ied] . . . [the Adult Businesses] a reasonable opportunity to open and operate' their enterprise within the city in question." *Id.*, *citing City of Renton*, 475 U.S. at 54.

In this case, we have a paucity of locations, as elaborated upon below, combined with a system whereby a "sensitive use" can effectively veto any one of those locations whenever an application for adult usage is made, even if the permit process has been nearly completed. For purposes of the instant motion, we need decide only that such a system of de facto veto power on the part of churches, schools, etc.

over protected first amendment activity is unconstitutional where the factual circumstances are such that alternative locations are as limited as they are in this case. The two factors combine to make it extremely likely that an adult usage applicant, such as Mr. Young, will have an extraordinarily difficult time finding a satisfactory alternative location and completing the permit application process with regard to that location.

Furthermore, the failure of Simi Valley to narrowly tailor its statute, *see Renton*, 475 U.S. at 52 (analyzing degree to which statute at issue was narrowly tailored), is evident in the fact that other alternatives could well have been utilized which would have avoided the constitutional infirmity existent here. Although it is not our role to prescribe precisely how Simi Valley should go about altering their ordinance so as to comply with the Constitution, we note merely for illustrative purposes that Simi Valley could, for example, have constructed an ordinance which, from the time of adult usage application, would effectively waive the existing distance requirements with regard to any new churches, schools or other "sensitive uses" that might arise. In that way, churches, schools and other sensitive uses would remain free to open, but would be on notice that, from the time of an adult usage application, they would be taking the risk of opening within close range of an adult theater. The choice would obviously then be for the sensitive use themself to make — either go elsewhere (which is likely what the sensitive use would do once the permit were finally approved), or risk locating themself near an adult usage. While this obviously would be less preferable to the drafters of the ordinance than the more restrictive means currently

employed, this would also be far less likely to run afoul of the constitution, as it would provide potential adult theater owners with a reasonable opportunity to find alternative avenues of communication.[1]

In short, the existence of a relative paucity of alternative avenues of communication, combined with a process which effectively enables sensitive usages to prevent an adult usage from successfully completing its permit process for one of the available locations, unreasonably restricts potential means of communication for those wishing to establish adult clubs. Hence, the ordinance as it currently exists and as it is currently applied, runs afoul of the First Amendment.[2]

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1. The Court again stresses that it is by no means directing or prescribing that the example here cited be utilized by Simi Valley. Rather, the Court makes the instant point only to illustrate the existence of constitutional alternatives to Simi Valley's scheme.

2. Defendant argues that it would be improper to find that a mere application for zoning approval creates a vested property interest in the applicant. The Court's holding is not based upon the purportedly vested property rights of an individual applicant. Rather, the Court's holding is simply that the overall effect of Simi Valley's scheme is such as to make it unreasonably difficult, and hence unconstitutionally difficult, for an individual to open a nude dancing facility. This is not to say that no constitutional system could possibly exist whereby an individual could lose their chosen and applied for location during the permit process. Rather, the Court holds only that the facts of the instant case are such as to amount to an unreasonably difficult, if not impossible, application process.

Appendix B

b. Existence of No More Than Three to Four Potential Locations Which Could Operate Simultaneously.

The Court also notes, as alluded to above, that the current ordinance is unconstitutional on the independent basis that, even without the effective veto ability of sensitive usages, the ordinance simply does not provide for a sufficient number of reasonable alternative locations. It was largely undisputed at trial that the maximum number of sites which could exist at one time, given the 1000 foot buffer requirement, is three. Defendant did point out, however, that defendant's expert, although conceding at trial that there were essentially only three separate areas within the city in which locations could simultaneously exist without infringing the 1000 foot buffer zone, also opined that one might conceivably be able to stretch the distance between two locations so as to amount to a total of four locations. We will assume, then, for purposes of the instant motion, that the total number of sites which can exist simultaneously is four. We further note, of course, that the total number of potential locations, without accounting for the requirement that no adult location exist within 1000 feet of another adult location, is of course greater.

Indeed, while, accepting defendant's evidence as true, the total number of possible locations, not accounting for the required buffer zone between adult usages, is 35-120, *see* Opposition at 6, the most relevant number for inquiry is four — as this is the number of adult usages which could conceivably exist at the same time. *See 3570 East Foothill Blvd., Inc. v. City of Pasadena*, 912 F.Supp. 1257, 1264

(C.D. Cal. 1995). The Ninth Circuit in *Walnut Properties, Inc. v. City of Whittier*, 861 F.2d 1102 (9th Cir. 1988), analyzing a similar ordinance, made clear that the primary inquiry in determining whether a "reasonable" number of alternative sites existed was the total number of sites which could exist simultaneously. There, the Court stated:

> [u]nder the terms of the ordinance in question, an estimation of total available acreage is next to meaningless. This is not a case in which a greater amount of acreage would necessarily allow a greater number of sites for adult businesses. Instead, this ordinance imposes a 1,000-foot separation requirement between any two adult businesses, thereby preventing such businesses from clustering within a given area. The number of sites available to adult businesses under the ordinance, therefore, depends not so much on the total amount of acreage available under the zoning scheme, but on how that acreage is dispersed throughout the City.

Id. at 1108.

In *Walnut Properties*, the Ninth Circuit ultimately held that the ordinance in question was unconstitutional, finding that a reasonable number of alternative sites did not exist. There, the court held that, even accepting the City of Whittier's proffered number of three available alternative sites which could simultaneously exist, *id.*, "the paucity of alternative sites is glaring." *Id.* at 1109. The Ninth Circuit ultimately noted that, "[t]o hold, as the City urges, that there

are adequate alternatives available for expression of this sort would make a mockery of First Amendment protections and would render meaningless the Supreme Court's admonition that an ordinance must not 'effectively den[y] . . . a reasonable opportunity to open and operate an adult theater within the city.' " *Id.*, *citing Renton*, 475 U.S. at 53-54.[3]

The circumstances in the instant case are remarkably similar. The fact that there may be four sites which can exist simultaneously in the instant case as opposed to three is immaterial, given the Ninth Circuit's finding that three sites in the City of Whittier amounted to a "glaring" constitutional violation. Hence, while it is true that there is no "constitutional minimum" as a matter of general law, it is also true that, in conducting the case by case analysis which the Supreme Court prescribes, the clear result in the instant case, in light of Ninth Circuit precedent, is that the existence of four potential sites which could simultaneously operate

---

3. In an earlier summary judgment motion prior to trial, defendant sought to distinguish *Walnut Properties* on the basis that *Walnut Properties* concerned an ordinance which would apply retroactively to existing theatres. (*See* Reply to Summary Judgment Motion at 8). While it is true that *Walnut Properties* clearly factored in the ordinance's retroactive effect in ultimately finding the ordinance unconstitutional, *Walnut Properties*, 861 F.2d at 1110, the court did not rely upon the ordinance's retroactivity in choosing the other factors to weigh in the balance. Specifically, the Court did not rely upon the ordinance's retroactive effect in determining what amounted to an "unreasonable number of alternative sites." Hence, the court's statements with regard to the importance of determining the total number of sites that could simultaneously exist under the ordinance were in no way dependent upon the fact that the ordinance would have a retroactive effect.

in the City of Simi Valley, simply does not amount to a reasonable number of alternative means of communication. On this basis alone, then, the existing ordinance violates the First Amendment.

For the foregoing reasons, the Court hereby GRANTS plaintiff's motion for declaratory and injunctive relief. Specifically, it is hereby ordered that defendant City of Simi Valley is permanently enjoined from enforcing its current zoning scheme with respect to the distance and buffer zone requirements currently in effect for adult theaters, as discussed herein. Furthermore, it is hereby declared that said zoning scheme violates the First Amendment to the United States Constitution, both on its face and as applied by the City of Simi Valley, as discussed herein.

IT IS SO ORDERED.

DATED: August 27, 1997

s/ William J. Rea
WILLIAM J. REA
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED JULY 31, 2000

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 97-56484
DC No. CV 94-8305 WJR

PHILIP YOUNG,

Plaintiff-Appellee,

v.

CITY OF SIMI VALLEY,

Defendant-Appellant.

ORDER

Before: FERGUSON, O'SCANNLAIN, and TASHIMA, Circuit Judges.

The panel has voted to deny appellant's petition for panel rehearing, with Judge O'Scannlain voting to grant panel rehearing. Judge Tashima votes to deny the petition for rehearing en banc and Judge Ferguson so recommends. Judge O'Scannlain votes to grant the petition for rehearing en banc.

Appendix C

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on en banc rehearing. Fed. R. App. P. 35(b).

The petition for panel rehearing and the petition for rehearing en banc are denied.

APPENDIX D — RELEVANT CODES

SIMI VALLEY MUNICIPAL CODE

Article 20. Adult Entertainment Establishments

Sec. 9.1-2001. Purpose.

In adopting this article, the City Council finds that adult entertainment establishments have certain objectionable side effects which render such adult businesses incompatible with residential areas, schools, places of worship, and other family and youth-oriented uses when located in close proximity to them. This article seeks to ensure that family-oriented uses, youth-oriented businesses, and adult entertainment uses will be located in separate and compatible locations. The City may legitimately use the zoning power to preserve the character of neighborhoods, protect the integrity of public places, and effectively meet the impacts of urbanization upon the quality of life within the City.

(§ 4, Ord. 796, eff. June 3, 1993)

Sec. 9-1.2002. Definitions.

As used in this article, the following terms shall have the following meanings:

(a) "Adult book store" means an establishment having as a substantial or significant portion of its stock-in-trade, for sale, rental, exchange, or display, books, magazines, newspapers, periodicals, catalogs, or other printed material distinguished or characterized by an emphasis on depicting, describing, or relating to sexual activities or specified anatomical areas, as defined herein.

(b) "Adult cabaret" means a nightclub, theater, or other establishment which features live performances by topless and/or bottomless dancers, go-go dancers, exotic dancers, strippers, or similar entertainers, and where such performances are distinguished or characterized by an emphasis on sexual activities or specified anatomical areas, as defined herein.

(c) "Adult hotel or motel" means a hotel or motel wherein material is presented regularly and substantially which is distinguished or characterized by an emphasis on depicting, describing, or relating to sexual activities or specified anatomical areas, as defined herein.

(d) "Adult massage parlor" means an establishment in which any person, firm, association, or corporation, in exchange for any form of consideration or gratuity, engages in any method of pressure on, friction against, or stroking, kneading, rubbing, tapping, pounding, vibrating, or stimulating with the hands or with the aid of any mechanical or electrical apparatus or appliance the specified anatomical area of patrons, as defined herein.

(e) "Adult mini-motion picture theater" means an enclosed building with a capacity for less than fifty (50) persons which is used regularly and substantially for presenting subject matter distinguished or characterized by its emphasis on depicting or relating to sexual activities or specified anatomical areas, as defined herein, for observation by patrons within the establishment.

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(f) "Adult motion picture arcade" means any place to which the public is permitted or invited where coin- or slug-operated or electronically, electrically, or mechanically controlled still or motion picture viewing machines, projectors, or other image-producing devices are maintained regularly and substantially to show images to five (5) or fewer persons per machine at any one time, and where the images so displayed are distinguished or characterized by an emphasis on depicting or describing sexual activities or specified anatomical areas, as defined herein.

(g) "Adult motion picture theater" means an enclosed building with a capacity of fifty (50) or more persons which is used regularly and substantially for presenting subject matter distinguished or characterized by its emphasis on depicting, describing, or relating to sexual activities or specified anatomical areas, as defined herein, for observation by patrons in the establishment.

(h) "Adult video store" means an establishment having as a substantial or significant portion of its stock-in-trade, for sale, rental, exchange, or display, video tapes or disks, films, slides, photographs, or other film media distinguished or characterized by an emphasis on depicting, describing, or relating to sexual activities or specified anatomical areas, as defined herein.

(i) "Model studio" means any business where, in exchange for or acceptance of any form of consideration or gratuity, figure models who display specified anatomical areas, as defined herein, are provided to be observed, sketched, drawn, painted, sculptured, photographed, or

similarly depicted by patrons involved in the transfer of such consideration or gratuity.

(j) "Sexual encounter center" means any business, agency, or person who, in exchange for or acceptance of any form of consideration or gratuity, provides a place where three (3) or more persons who are not all members of the same family may congregate, assemble, or associate for the purpose of engaging in sexual activities or exposing specified anatomical areas, as defined herein.

(k) For the purpose of this section, "anatomical areas" include:

(1) Less than completely and opaquely covered human genitals, pubic regions, buttocks, and female breasts below the point immediately above the top of the areola, and

(2) Human male genitals in a discernible turgid state, even if completely and opaquely covered.

(l) For the purpose of this section, "sexual activities" include actual or simulated sexual intercourse, oral or anal copulation, direct physical stimulation of unclothed genitals, flagellation or torture in the context of a sexual relationship, or the use of excretory functions in the context of a sexual relationship, as in any of the following sexually oriented acts or conduct:

Appendix D

(1) Human genitals in a state of sexual simulation, arousal, or tumescence; or

(2) Fondling or touching of nude human genitals, pubic region, buttocks, or female breast; or

(3) Masturbation or ejaculation; or

(4) Sexual intercourse, copulation, or coitus between two or more persons; or

(5) Anilingus, cunnilingus, fellatio, sapphism, or sodomy between two or more persons; or

(6) Pedophilia, pederasty, or erotic or lewd touching, fondling or other sexual contact with a child by an adult; or

(7) Bestiality, zooerastia, or erotic or lewd touching, fondling or other sexual contact with an animal by a human being; or

(8) Masochism, sadism, piquerism, erotic or sexually oriented torture or beating, or any other infliction of pain in a sexual context; or

(9) Coprophagy, coprophilia, human urination, defecation, menstruation, or vaginal or anal irrigation; or

(10) Necrophilia.

(m) "Youth-oriented business" shall mean a business activity, whether for profit or non-profit, which caters predominantly to on-site patronage by persons under eighteen (18) years of age who may be accompanied on site by a parent or guardian, and which is open for such business not less than twenty-five (25) hours per week.

(§ 4, Ord. 796, eff. June 3, 1993)

Sec. 9-1.2003. Location of adult entertainment establishments.

For the purpose of this section, adult entertainment establishments shall include adult book stores, adult cabarets, adult hotels and motels, adult massage parlors, adult motion picture arcades, adult motion picture theaters, adult mini-motion picture theaters, adult video stores, model studios, and sexual encounter centers, as defined in Section 9-1.2002 of this article.

(a) Regarding family-oriented uses, the location of adult entertainment establishments shall be governed by the application of buffer areas around protected land uses. A buffer area is formed by a specified horizontal straight line distance (measured in feet) radiating outward in all directions from the perimeter of any parcel zoned for or containing a protected land use. Adult entertainment uses shall not be located within any such buffer area.

(1) The portion of any building or structure containing an adult entertainment use must lie entirely outside of the buffer area around a protected land use.

(2) Protected land uses include any area zoned for or containing a residential use, as well as any public or private school, park, playground, church or other place of worship, or any noncommercial establishment operated by a bona fide religious organization as described in Section 3-1.112(a) of the Simi Valley Municipal Code.

(b) Regarding youth-oriented businesses, the location of adult entertainment establishments shall be governed by the application of buffer areas around protected land uses. A buffer area is formed by a specified horizontal straight line distance (measured in feet) radiating outward in all directions from the perimeter of any parcel containing a protected land use. Adult entertainment uses shall not be located within any such buffer area.

(c) Regarding adult entertainment establishments, the location of all such adult entertainment uses shall be governed by the application of a minimum separation distance between the perimeter of one such use and the perimeters of all other such uses. The separation distance is formed by a specified horizontal straight line (measured in feet) radiating outward in all directions from the perimeter of adult entertainment uses.

(d) Adult entertainment uses may be located in the CPD and CI zones (see Section 9-1.507), provided that the proposed use shall not be located:

(1) Within 500 feet of an area zoned for or containing a residential use; or

(2) Within 500 feet of an area containing a youth-oriented business; or

(3) Within 1000 feet of any other adult entertainment establishment; or

(4) Within 1000 feet of any public or private school, park, playground, church or other place of worship, or any noncommercial establishment operated by a bona fide religious organization.

(§ 4, Ord. 796, eff. June 3, 1993)

Sec. 9-1.2004 Time to issue or deny the permit.

All adult entertainment establishments shall be governed by a special use permit (SUP) as follows:

(a) In accordance with Section 9-1.1103(e) of this chapter, an SUP shall be required prior to:

(1) The construction of any new adult entertainment establishment;

(2) The expansion of any existing adult entertainment establishment;

(3) The installation of tenant improvements associated with any new or modified adult entertainment establishment; and

(4) The opening or re-opening of any other adult entertainment establishment.

(b) A decision to approve or deny the SUP shall be reached within ninety-four (94) days following the date the SUP application is deemed complete by City staff, subject to any appeals pursuant to Section 9.1.1105(h), (i), (j), and (k) of the Simi Valley Municipal Code.

(§ 4, Ord. 796, eff. June 3, 1993)

Sec. 9-1.2005. Continuation of existing nonconforming uses.

Any adult entertainment establishment land use (as defined in Section 9-1.2003) legally in existence prior to the effective date of this article which meets any of the definitions in Section 9-1.2002 of this article and the existence of which after the effective date hereof is in violation of this article, as determined by the Director of Environmental Services, shall be deemed a nonconforming use hereunder, and shall be subject to the provisions set forth below:

(a) Any such existing adult entertainment establishment land use not in full compliance with this article shall be deemed to be a nonconforming use and may continue until the owner of record identified in subsection (c) hereinbelow sells, transfers, assigns, sublets, closes, or otherwise ceases to operate it for thirty (30) consecutive calendar days. Upon the occurrence as referred to in this subsection (a), the nonconforming use shall cease.

(b) A nonconforming use as defined herein shall not be subject to any of the restrictions herein.

(c) To qualify for continuation of an existing nonconforming use, an adult entertainment establishment must file, within sixty (60) calendar days of the effective date hereof, with the Director of Environmental Services, a written request to qualify under this section. Upon verifying that such adult entertainment, establishment was in conformance with all laws and applicable regulations not less than sixty (60) days prior to the effective date hereof, the Director of Environmental Services shall grant said request and mail notification thereof to the requestor. Any adult entertainment establishment eligible hereunder which fails to timely file its written request as provided herein shall thereafter be ineligible for any adult entertainment establishment operation continuation rights under this section. Within fifteen (15) calendar days of the effective date hereof, the foregoing procedure shall be noticed to all potential benefitting adult entertainment establishments in the City by a press release and a one-eighth (1/8) page advertisement placed in the newspaper used by the City for its legal advertising.

(§ 4, Ord. 796, eff. June 3, 1993)

Sec. 9-1.2006. Penalties.

Any person who violates this article shall be guilty of a misdemeanor and may be punished for each violation as follows:

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(a) By imprisonment in the County Jail for a time not to exceed six (6) months; or

(b) By a fine not exceeding One Thousand and no/100ths ($1,000.00) Dollars; or

(c) By a combination of such imprisonment and fine.

Each calendar day during which a violation is found to exist shall constitute a separate violation punishable hereunder.

(§ 4, Ord. 796, eff. June 3, 1993)

* * * *

Supreme Court, U.S.
FILED
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No. 00-701

In The
SUPREME COURT OF THE UNITED STATES

CITY OF SIMI VALLEY

Petitioner

v.

PHILIP YOUNG,

Respondent

On Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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I. OPPOSITION TO PETITION

The City's recitation of the facts in its Statement of the Case bears little resemblance to the actual events as correctly related by the District Court and the Ninth Circuit. For example, the City's Petition contains the following paragraph (Petition, p.2):

> "In late 1992, respondent . . . Young . . . applied for a special use permit to open and operate an adult nude dancing establishment at 999 East Los Angeles Avenue in Simi Valley. . . ."

The paragraph quoted above from the City's Petition should be compared with the second paragraph of the "Factual and Procedural Background" portion of the Ninth Circuit's opinion reprinted in appendix A at page 3a. The Ninth Circuit's paragraph refers to the proposed business as "an adult business. . .," not a ". . . nude dancing establishment. . . ." The City gratuitously includes the word "nude" to interject a non issue in this case and to create the third question presented.

What Young proposed was an adult cabaret, which is defined in the Simi Valley Municipal Code set forth at the top of appendix D, page 58a:

> "'Adult Cabaret' means a nightclub, theater, or other establishment which features

> live performances by topless and/or bottomless dancers, go-go dancers, exotic dancers, strippers, or similar entertainers, and where such performances are distinguished or characterized by an emphasis on sexual activities or specified anatomical areas, as defined herein."

The City's zoning, locational, and permit provisions of its Code apply to adult cabarets and are not restricted to totally nude establishments. Thus, nudity and City of Erie v. Pap's A.M., 529 U.S. 277, 120 S.Ct. 1382 (2000) are not involved in this case. Whether or not Young may be prohibited by the City from presenting totally nude entertainment, which he would like to present, Young still would like to open an adult cabaret and present whatever "adult entertainment" the Constitution requires the City to allow. Whether that includes nude dancing is irrelevant to this adult zoning case.

Young would not oppose this Court's granting of certiorari with respect to Question No. 3 if it meant this Court might reconsider its disastrous and totally unsupportable decision in City of Erie v. Pap's A.M., (that cities may prohibit totally nude dancing no matter how beautiful, artistic, non obscene, non lewd, and no matter that it is presented in enclosed theaters for adults only in industrial zones far away from sensitive uses). Otherwise, nudity is irrelevant to the issues considered by the District

Court and the Ninth Circuit.

Moving on with our comparison of the City's "facts" with the Ninth Circuit's facts we note that the City omitted the following facts from its Petition even though they are set forth in paragraphs 2 and 3 of the Ninth Circuit's "Factual and Procedural Background:"

After Young applied for the special use permit in late 1992, ". . . Young received a zoning clearance from the City, and applied for and received a business tax certificate." (Appendix A, p.3a).

The City also omits the following information: that on February 9, 1993 the City unilaterally rescinded without a hearing Young's zoning clearance and then adopted an emergency moratorium ordinance banning all adult uses throughout the City; this wiped out Young's proposed adult cabaret. Later the City adopted a permanent adult zoning ordinance which Young challenged in his lawsuit filed December 12, 1994. Young also challenged the rescission of his clearance.

The City's Petition did not mention that zoning clearance recission because it reveals the depths to which the City descended in its successful efforts to keep out all adult businesses.

The City next recounts Young's discovery of an alternative location at 585 East Los Angeles Avenue, but fails to mention that Young contacted the City to determine whether this new site was lawful for an adult cabaret and fails to mention what the Ninth Circuit stated in its opinion,

Appendix A, p. 5a:

> ". . . The City conducted a preliminary site inspection of the area and determined that there were no incompatible uses under the ordinance at that time. . . ."

The City explains in its Petition that the City denied Young's application for a special use permit for the new location at 585 East Los Angeles Avenue for two reasons: a karate school was already operating within 500 feet of Young's site and also the "Joshua Institute" had obtained an over the counter zone clearance on December 7, 1995, the day before the City deemed Young's application complete. Therefore, the City asserts, the City denied the application for two independent reasons, the existence of a karate school and the zone clearance for the Joshua Institute. Accordingly, the City asserts that independent of the Joshua Institute, since the karate school also disqualified the application the Ninth Circuit should not have reached the issue of whether the sensitive use veto renders the system unconstitutional. The City argues that Young lacks standing to challenge the veto provision of the ordinance.

However, while the Ninth Circuit may not have expressly mentioned the testimony of Young regarding his own refusal to go through the lengthy process again because of the sensitive use veto provision of the Simi Valley Municipal Code, the District Court did address the issue when it discussed the issue of Young's standing. The

portion of the District Court opinion reprinted at Appendix B, p. 44a, makes it quite clear that Young himself testified that he would never reapply for the required permit because of the sensitive use veto provision of the code. The District Court stated as follows:

> "Furthermore, Mr. Young specifically testified that, given his previously futile efforts and the time and money invested in these earlier efforts, he would not consider reapplying for a permit so long as the current system remains in effect in Simi Valley."

This presents a classic case of an individual who was deterred from exercising his First Amendment rights in a "real and substantial" way. Hence, Mr. Young clearly has standing to challenge the instant ordinance." Appendix B, pp.44a-45a.

The District Court's statement was based directly upon the trial court record, which Young will set forth here at length and in detail because of the City's unbelievable assertion that Young lacks standing to challenge the sensitive use veto provision of the code.

Young's trial testimony was as follows:

> "Q. Now, are you familiar with the place where the

Joshua Tree Bible study was able to get together and start its Bible study class?
A. I remember the place.
Q. It's depicted here on the photograph to the right. Can you point that out to the jury?
A. (Indicating.)
Q. And do you understand that in April of '96 it was simply -- in April of 1996 it was simply some folding chairs on a cement slab?
A. Yes.
Q. And you understand that the city - - that the city council meeting in April of '96 determined that that was a sufficient church or religious organization to preclude your adult theater from going in?
A. Yes.
Q. Now, as far as you can determine, would there be anything to stop a similar Bible study school from moving in in the same manner that it moved in within 500 feet of your location if - -
A. No.
Q. - - you have to finish - - let me finish the question.

Do you know whether there's anything to prevent the same thing from happening again if you were to happen to find a place at the shopping center for a proposed adult theater?
A. No .
Q. And there are at least - - there was one vacancy that would allow this to occur again? You can resume the witness stand.
A. Is there a vacancy that would allow this to happen again. There was no - - if there was a vacancy, but there was none that I could see.
Q. In the first area?
A. In any of the three areas.
Q. There was no - - but if there were a vacancy this could happen?
A. This could happen, definitely. They could move another what they call Bible school in there and preclude me from doing that again.
Q. Now, if theoretically you could find a place in the two shopping areas to put in an adult theater, knowing that it takes quite a bit of time to get approval, that even when

your application is completed, even then the city has 94 days to set a hearing before the planning commission, and even if the planning commission were to approve you, anybody could appeal the decision in your favor to the city council, it would get that person a new hearing. And assuming that at that new hearing the Bible study class moved into the shopping center vacancy that might occur, given all of that, would you want to try to locate an adult theater in the shopping center, now that you know what happened to you with respect to this particular project?

A. No, I would not.

Q. And why not?

A. Because I don't want to spend x amount of money for rent again, and go through all of the process just to be defeated again by somebody just moving in and claiming to be a religious organization or karate or whatever it is - - whatever it might be.

Q. So even if you could find

a place in the shopping center, and even if the parking were satisfactory and all of that, because of this system that the city has created, you would not want to try this again?
A. I would not, that's correct."(3 RT 13-16; SER 78-81)

Young's testimony continued:

"Q. What did you want?
A. I wanted a place to operate my business.
Q. And is that still your goal?
A. Well, under the circumstance, it's my goal, but I don't think under the circumstances I can ever do it, because they could always throw another church next to me, after another year of hard work. And it would just be all futile.
Q. So because of the ordinance, you are not willing to go to some other area, because this could happen again?
A. Right." (3 RT 166; SER

95)

In summary, for the reasons set forth above, this Court should deny certiorari with respect to questions 1 and 3. Young unquestionably had standing to challenge the veto provision of the code. Thus, question number 1 is not worthy of review. Likewise, question number 3 is irrelevant because this is an adult zoning case, not a nude dancing case.

II. IF CERTIORARI IS GRANTED IT SHOULD BE LIMITED TO QUESTION NUMBER TWO

Question number two includes the question as to whether the City has provided "a legally adequate number of adult business sites. . . ." See question number two at the beginning of Petition.

The Ninth Circuit stated in its opinion that Simi Valley is located approximately 35 miles north west of Los Angeles, has a population of slightly over 100,000 residents, and occupies 34 sq. miles in area. The District Court separately concluded that the number of possible sites for adult businesses in the City was "unconstitutionally low . . . ." Appendix B, p.46a.

The Ninth Circuit reversed the District Court on this point and concluded that as a matter of law four sites may be constitutional. It is this portion of the Ninth Circuit's decision which this Court may choose to review. The constitutional adequacy of the number of sites offered by the City of Simi Valley is fairly included within question number two. This Court would have jurisdiction under

Rule 14.1(a) to consider the question of whether the Ninth Circuit erred in vacating the District Court's injunction on the issue of adequacy of alternative locations. See Ohio v. Robinette, 519 U.S. 33, 38, 136 L.Ed.2d 347, 117 S.Ct. 417, 420 (1996) and Vance v. Terrazas, 444 U.S. 252, 258-259, n. 5, 62 L.Ed.2d 461, 100 S.Ct. 540, 544-545, n. 5 (1980). The issue of the sufficiency of alternative locations for First Amendment protected adult businesses is an important issue that this Court should resolve. The same issue is already pending before this Court in Diamond v. City of Taft, No. 00-608, docketed October 18,2000. It is also expected that the City of Long Beach, California will petition this Court for certiorari to review the decision of the Ninth Circuit in Lim v. City of Long Beach, 217 F.3d 1050 (9th Cir. 2000). The Petition by Long Beach should be filed by November 21, 2000. All of these adult zoning cases will give this Court an opportunity to resolve the question as to the requisite number of adult business sites a particular city must offer prospective applicants.

It is expected that the City of Los Angeles will petition this Court for a writ of certiorari to review another recent Ninth Circuit adult zoning case, Alameda Books v. City of Los Angeles, 222 F.3d 719 (9th Cir. 2000).

The issue of reasonable alternative locations for adult businesses might be separately considered by a court but given the instant case the issue can be dealt with in the context of question number two. If certiorari is granted Respondent Young will submit a brief on the merits dealing with the issue of the adequacy of alternative locations since the issue is part of question number two. Accordingly, Respondent Young will not separately file a cross petition

on this issue.

With respect to question number two as framed by Petitioner it is clear that it is unconstitutional for a city to have a sensitive use veto provision because it does create an impossible situation for those seeking to open and operate adult businesses. As this case demonstrates, the permit process is lengthy and expensive. No one would go through the process if one could have his permit knocked out at the last minute. This is not a question of whether the City should prefer an adult business over a church or a school. Churches or schools are not precluded from operating near an adult business. It is inconceivable that an evil person would deliberately file thousands of applications for adult businesses to deter schools and churches from opening in particular areas. The idea that this could occur is preposterous. No prospective adult business owner deliberately files a permit application just to discourage a school or a church from moving into the area. The argument defies reality. There are so few places where adult businesses can be located in the first place that the danger is imagined, not real.

Respondent Young does agree with the Ninth Circuit that this is a case of first impression and therefore this Court may wish to take a second look at the issue. Obviously, if this Court should grant certiorari on question number two Respondent Young will seek affirmance of the Ninth Circuit. As stated, Respondent Young will also seek a ruling from this Court as to the adequacy of alternative locations.

III. CONCLUSION

For the foregoing reasons, Respondent Young opposes certiorari with respect to Questions 1 and 3 but does not oppose certiorari with respect to Question 2 if this Court includes within the question the issue of adequacy of alternative locations.

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Supreme Court, U.S.
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No. 00-701

In The

Supreme Court of the United States

THE CITY OF SIMI VALLEY,

Petitioner,

v.

PHILIP YOUNG,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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INTEREST OF THE *AMICI CURIAE*

The *amici* are 42 California general law and charter cities who have the authority under the Constitution and laws of the State of California, as well as local ordinances, to enact and enforce zoning and building regulations to protect the public health, safety and welfare. Although the rules and regulations may vary among jurisdictions, uniformly they require an initial application which must first be reviewed for completeness and compliance with applicable regulations before a permit is issued. There is no right to proceed with a project until a valid permit has been issued and changed circumstances during the application process may ultimately cause the permit application to be denied.

In this case, the City of Simi Valley approved another application for a permit before respondent's application for an adult nude dancing establishment, causing his request to be denied. The Ninth Circuit determined that the provision of the Simi Valley Code which allowed for such an eventuality was facially invalid under the First Amendment. There is, however, no such provision in the Simi Valley municipal code. The complained of "sensitive use veto" is not a veto at all, rather it is a practice or procedure of general applicability upheld by the California courts that says that the factors that exist as of the date of the final decision on a permit control its approval or denial, not those factors which existed at the time an application is filed.

Thus, the court's decision has placed in jeopardy the zoning and building regulations of all California cities. Not only has the Ninth Circuit created a legal right where

none existed before, its decision permits aggrieved developers to avoid a showing of "as applied" invalidity in favor of a direct facial constitutional challenge to building and zoning ordinances. This conflicts with this Court's standing requirements. Under the rationale of the court below, any business, not just an adult entertainment business, that is able to allege some real or imagined nexus to the First Amendment can obtain preferential standing in federal court, guaranteeing that federal courts will become the board of zoning appeals of first resort for local land use controversies.

Amici submit that the decision below is fundamentally incorrect and represents a marked departure from established precedent thereby severely restricting the ability of *amici* to effectively enforce generally applicable building and zoning laws. For these reasons, this Court should grant *certiorari* and reverse the decision of the Ninth Circuit.

RULE 37 STATEMENT

The Brief of the *Amici Curiae* in Support of the Petition for Writ of Certiorari is filed pursuant to Rules 37.2 (a) and 37.4 of the Rules of the Supreme Court of the United States. Written consent of all the parties has been obtained and proof of consent will be filled with the Clerk of the Court concurrently with the Brief of *Amici Curiae*.

ARGUMENT

The Decision Of The Court Of Appeals Is In Direct Conflict With The Holdings Of This Court In *Broadrick v. Oklahoma* And *Members Of The City Council v. Taxpayers For Vincent.*

This lawsuit is the result of the denial of a permit to open an adult nude dancing establishment by the City of Simi Valley (City). The City's zoning code (App. D, at 57a-67a*), as do most zoning ordinances regulating the location of adult businesses, provides a buffer distance between the adult business and traditionally protected or sensitive land uses such as churches and schools. App. D, at 63a-64a. After the permit application was submitted, but prior to its final approval, two events occurred which caused the denial of the permit. First, it was discovered that the proposed location for the dance club was within 500 feet of an existing sensitive use, a youth oriented karate school. The existence of this youth oriented business would have prevented the issuance of a permit for that site. App. A, at 8a-9a. Second, a sensitive use under the City's ordinance, an adult bible class operated by a qualifying religious organization, the Joshua Institute, received a permit to operate within the buffer zone surrounding the adult club, thus providing an additional reason to deny the permit for the adult use. App. A, at 6a-7a.

The owner of the proposed adult business, Philip Young, appealed the denial of his permit application to

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* References are to the appendices to the Petition for Writ of Certiorari filed by the City of Simi Valley filed October 30, 2000 and docketed November 2, 2000.

the City Planning Commission and the City Council. The Planning Commission determined that compliance with the buffer provisions of the zoning ordinance was to be determined as of the date of the project approval, not the date that the application was filed. App. A, at 8a-9a. Further, the Commission determined that irrespective of the presence of the Joshua Institute, the application was properly denied because of the existence of the karate school. App. A, at 9a. The City Council affirmed. App. A, at 9a.

The Court of Appeals held for Mr. Young on the grounds that the "sensitive use veto" was facially unconstitutional, analogizing, *inter alia*, to *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982). App. A, at 22a-24a. In doing so the court made several fundamental errors. First, the City's adult businesses zoning ordinance (App. D) does not contain a provision delegating zoning approval to third parties, nor does the majority opinion cite to any other provision of the Simi Valley municipal code which purports to authorize such a delegation to a third party. As discussed below, the City's determination to look to the date of approval for disqualifying factors, not the date an application is filed, is not a veto. The right to build does not occur until the permit is issued. Second, the court studiously ignored the impact of the pre-existing sensitive land use, the karate school, requiring the City to issue a concededly invalid permit.

The constitutional issue raised by the court's decision, and a matter of the greatest concern to the *amici*, is the almost cavalier manner in which the Court of Appeals ignored this Court's standing rules to strike as facially invalid the non-existent sensitive use veto, rather than

conducting an "as-applied" inquiry as required by *Broadrick v. Oklahoma*, 413 U.S. 601 (1973) and *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984). Although the court's analysis can be dismissed as nothing more than the Ninth Circuit's continuing hostility to municipal zoning ordinances regulating the location of sexually explicit adult entertainment businesses authorized by *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976) and *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41(1986), the practical effect has greater implications. Local building and zoning regulations can now be directly challenged as facially invalid by a litigant who can allege any nexus to the First Amendment and then create a potential for unconstitutional application to anyone who might apply for a permit. The probability of such litigation resulting from the decision below is of great concern to *amici*, but of greater concern is that long standing zoning and building regulations will no longer be effective in protecting the public health, safety and welfare.

A. There Is No Sensitive Use Veto.

An application for a permit is just that, an application. A developer is not entitled to a permit as a matter of course upon filing an application, and must comply with those laws which are in effect at the time of approval, including laws enacted after the application was filed. *Avco Community Developers, Inc. v. South Coast Regional Comm'n*, 17 Cal.3d 785, 795, 132 Cal.Rptr. 386, 390, 553 P.2d 546, 552-553 (1976), *cert. den.*, 429 U.S. 1083 (1977). Moreover, even a reviewing court must "apply the law in

existence at the time of its decision rather than at the time the permit was denied . . . to prevent an appellate court from issuing orders for the construction of improvements contrary to presently existing legislative provisions." *Selby Realty Co. v. City of San Buenaventura*, 10 Cal.3d 110, 125, 109 Cal.Rptr. 799, 809, 514 P.2d 111, 121 (1973).

There is no entitlement to a building permit as a matter of course even if there is compliance with local zoning and building codes. *Guinnane v. San Francisco City Planning Com.*, 209 Cal.App.3d 732, 736, 257 Cal.Rptr. 742, 744 (1989), *cert. den.* 493 U.S. 936 (1989). A developer has no entitlement where the permit is invalid. *Pettitt v. City of Fresno*, 34 Cal.App.3d 813, 820-823, 110 Cal.Rptr. 262, 266-268 (1973). There is no right to complete construction where the permit was issued upon incorrect facts. *Stokes v. Board of Permit Appeals*, 52 Cal.App.4th 1348, 1357, 61 Cal.Rptr.2d 181, 186 (1997). Even if a permit is issued, no right to complete the project "vests" unless an owner can demonstrate that he has performed substantial work and incurred substantial liability in good faith reliance on a validly issued permit. *Avco Community Developers, supra*, 17 Cal.3d at 791, 132 Cal.Rptr. at 390, 553 P.2d at 550.

California precedent thus sensibly recognizes that the vagaries of the development process are such that permit applications may be denied due to changed conditions during the approval process. The Ninth Circuit did not accept this and converted routine practice and procedure into an unconstitutional delegation of the police power to private parties. It is settled in California that the exercise of the police power, including enforcement of land use regulations, cannot be delegated to others and such a

delegation is invalid as against public policy. *Avco Community Developers, supra,* 17 Cal.3d at 800, 132 Cal.Rptr. at 396, 553 P.2d at 552-553. A review of the City's adult zoning ordinance (App. D) shows that there is no express delegation to third parties the right to approve or disapprove an adult business.

Nonetheless, the Court of Appeals felt compelled to analogize the judicially approved practices and procedures to this Court's holdings in *J.E. Eubanks v. City of Richmond,* 226 U.S. 137 (1912) (property owners have right to establish building set-back lines) and *Larkin v. Grendel's Den, Inc.,* 459 U.S. 116 (1982) (liquor licenses issued subject to the approval of churches and schools) which invalidated statutes that expressly delegated governmental authority to private parties. App. A, at 22a-24a. It is also important to note that unlike the standardless discretion vested in third parties which concerned this Court in those cases, the factors for approving or denying a permit in Simi Valley meet objective statutory criteria: an adult business is either within a buffer zone or without. Thus, the myriad of potential entanglement and procedural due process issues discussed in the cases relied upon by the court below are simply not relevant to this inquiry.

B. The Court Of Appeals Improperly Allowed Standing For A Facial Challenge To The Non-Existent Sensitive Use Veto.

Rather than addressing its procedural dues process concerns in the traditional "as-applied" manner favored by this Court, the Ninth Circuit determined that it was

proper to proceed with a direct facial challenge. App. A, at 12a-13a. In doing so, the Court of Appeals materially misapplied this Court's precedent permitting standing to facially challenge laws under the First Amendment overbreadth exception in only the most exceptional of circumstances, creating a conflict with this Court's holdings in *Broadrick v. Oklahoma*, 413 U.S. 601 (1973) and *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984).

Assuming that the well established and generally applicable California rule that one is not entitled to a permit as a matter of course upon filing an application was somehow unconstitutionally applied by the City in this case to deny Young his permit for an adult nightclub, the proper challenge is an "as-applied" challenge. Instead, the Court of Appeals allowed Young standing to facially challenge a non-existent provision of the Simi Valley ordinance thereby ignoring this Court's admonition that the facial overbreadth doctrine should be used "sparingly and only as a last resort" because "it is, manifestly, strong medicine." *Broadrick, supra*, 413 U.S. at 614.

Standing to make a facial challenge is now the remedy of first choice in the Ninth Circuit. *Broadrick* recognized, however, that the overbreadth doctrine should not be applied to invalidate a law "against conduct that is admittedly within its [the state's] power to proscribe" (*id.*, 413 U.S. at 615) and "that whatever defects may exist are best resolved through case-by-case analysis of the fact situations to which its sanctions [the law's] may not be applied." *Id.*, 413 U.S. at 615-616. Clearly, given this Court's decisions in *American Mini Theatres, supra* and

Renton, supra, the Simi Valley adult business zoning ordinance can be constitutionally applied to businesses such as Young's proposed club. Moreover, the California principle that there is no right to a permit based simply upon making application for one is a rule of general applicability, otherwise benign with respect to the First Amendment and Mr. Young's nude dance club. The fact that this principle "presents a First Amendment *issue,* is not necessarily to say that it constitutes a First Amendment *violation.*" *Taxpayers for Vincent, supra,* 486 U.S. at 803-804, (1984) quoting *Metromedia, Inc. v. San Diego,* 453 U.S. 490, 561 (1981) quoting, Burger, C.J., dissenting, emphasis in the original.

The insignificance of the "First Amendment *issue*" here for purposes of a facial challenge is amply demonstrated by this Court's precedence relied upon by the Ninth Circuit in permitting Mr. Young to have standing to facially challenge the chimerical sensitive use veto. In *Broadrick, supra,* (App. A, at 11a) this Court declined to facially invalidate an Oklahoma statute restricting the political conduct of state employees. *Broadrick, supra,* 413 U.S. at 615-616. Similarly, in *Taxpayers for Vincent, supra,* (App. A, at 12a) this Court rejected a facial challenge to a Los Angeles City ordinance which prohibited the posting of signs, including political signs, on public property. *Taxpayers for Vincent, supra,* 486 U.S. at 802. In comparison to the First Amendment issues in those cases, the issue here can best be considered *de minimis.* The Court of Appeals also relied on *Clinton v. City of New York,* 524 U.S. 417 (1998) (App. A, at 13 a) where this Court held that the 1996 Line Item Veto Act was unconstitutional because its cancellation provisions violated the Presentation Clause

of the Constitution, Art. I, § 7, cl. 2. *Id.* at 420-421. Again, although the instant matter is very important to Mr. Young, it simply does not rise to the constitutional dimension reflected in *Clinton v. City of New York* to warrant standing to undertake a facial challenge to the Simi Valley permit approval procedures.

CONCLUSION

The decision of the Court of Appeals to permit a direct, facial constitutional challenge to long established California practices and procedures governing the application process for zoning and building permits is contrary to this Court's decisions limiting facial challenges to only the most extreme situations. As a result of the Ninth Circuit's ill considered ruling, the ability of municipal governments to effectively enforce their building and zoning laws for the public benefit is put at jeopardy. The lower court's divergence from this Court's standing requirements for facial challenges can only be resolved by this Court's grant of the Petition for a Writ of Certiorari filed by the City of Simi Valley. Further, given this marked divergence from the principles set forth by this Court in *Broadrick* and *Taxpayers for Vincent*, it is respectfully suggested that this case is appropriate for summary

disposition in accordance with Rule 16.1 of the Rules of the Supreme Court of the United States.

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PHILIP YOUNG,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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ARGUMENT

Respondent Philip Young's standing analysis on Question 1 confirms that the Court of Appeals for the Ninth Circuit has radically expanded the First Amendment "overbreadth" exception to traditional standing requirements. Citing his trial testimony, Young argues that given the so-called "sensitive use veto" he would never reapply for a special use permit to operate an adult business. He concludes that "[t]his presents a classic case of an individual who was deterred from exercising his First Amendment rights in a 'real and substantial' way." Response at 5.

Young thus speaks exclusively of vindicating his own constitutional rights. Although his analysis may establish standing to bring an as applied challenge (*see Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 796 (1984)), it certainly does not permit a facial challenge, which "is predicated on 'a judicial prediction or assumption that the statue's very existence may cause *others not before the court* to refrain from constitutionally protected speech or expression.' " *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973) (emphasis added). In this respect, Young's analysis is irrelevant to this Court's review of the Ninth Circuit's opinion. The Ninth Circuit specifically did not premise Young's standing on his own rights, but rather held that his standing depended on the invocation of the overbreadth doctrine. Nothing in the Response disputes that, in permitting Young's facial challenge to petitioner City of Simi Valley's adult business ordinance, the Ninth Circuit broadened traditional standing rules to include cases where a time, place, and manner restriction allegedly infringes on the speech of parties not before the court. This Court must rectify the Ninth Circuit's unwarranted expansion of well established standing rules.

Young fails to dispute that Question 2 presents an issue worthy of this Court's consideration, responding instead with what is in effect an improper cross-petition for a writ of certiorari. Whether a municipality must favor adult uses over other land uses such as schools and churches is an important issue that should be decided by this Court.

With respect to Question 3, Young incorrectly argues that this case is not affected by *City of Erie v. Pap's A.M.*, 529 U.S. 277, 120 S. Ct. 1382 (2000). Young explains that since the City of Simi Valley's ordinance covers adult entertainment other than totally nude dancing, "nude dancing is irrelevant to this adult zoning case." Response at 2. Yet Young also states that if he opens an adult business it would include nude dancing. *Id.* This case thus spotlights the tension between the *Erie* case and *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), an issue which this Court should address.

CONCLUSION

For the foregoing reasons, the City of Simi Valley respectfully requests that the petition for a writ of certiorari be granted.

Respectfully submitted,

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In The

Supreme Court of the United States

THE CITY OF SIMI VALLEY,

Petitioner,

v.

PHILIP YOUNG,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF OUT OF TIME AND BRIEF OF 211 ALPINE STREET, LLC, AS AMICUS CURIAE IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE AMICUS BRIEF OUT OF TIME

Comes now 211 Alpine Street, LLC, and moves this Court for leave to file a brief out of time as amicus curiae in opposition to the petition for writ of certiorari in this action. The circumstances giving rise to this motion are set forth below.

Amicus is a plaintiff in a lawsuit presently pending in the United States District Court for the Central District of California against the City of Los Angeles.[1] On Friday, December 29, 2000, undersigned counsel learned for the first time that the City of Los Angeles recently filed an amicus curiae brief in this Court in the current case in support of issuance of a writ of certiorari. This factor is extremely significant to 211 Alpine Street because it is presently locked in litigation with the City of Los Angeles under circumstances almost exactly identical to those presented in *City of Simi Valley v. Philip Young*. Specifically, the City of Los Angeles, like the City of Simi Valley, allows so-called "sensitive uses" which come into existence for the first time only *after* an adult business applicant has filed its relevant permit applications, to defeat the adult business' permit application. That is in fact what happened in the current district court litigation between amicus 211 Alpine Street and amicus City of Los Angeles.

Specifically, 211 Alpine Street had filed building permit applications for a live entertainment adult business

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[1] *211 Alpine Street, LLC v. City of Los Angeles*, C.D. Cal. No. 00-8791 ER (AJWx).

use in connection with property it had purchased at a cost of more than a million dollars. It made this purchase only after carefully checking for, and insuring compliance with, the City's zoning ordinances, including its special "adult" zoning ordinances. However, after it filed its applications, a nearby landowner announced his staunch opposition to such development, and he then quickly obtained a new certificate of occupancy from the City allowing him to use a small part of his existing commercial property as a so-called "classroom", i.e., a "school." A sham school was then established on the site, and 211 Alpine's permit application was then denied based on the existence of this so-called "school."

Because 211 Alpine Street is not a party in *City of Simi Valley v. Young*, the City of Los Angeles, appearing as amicus herein, was under no formal obligation to serve 211 Alpine Street contemporaneously with a copy of its amicus brief and did not do so. Consequently, and as noted above, 211 Alpine did not learn of this filing until Friday, December 29, 2000, when it chanced to discover this information. The City of Los Angeles did send a copy of its brief to undersigned counsel on that date, however, following a specific request to that effect by undersigned counsel.

Upon a quick reading of the amicus brief submitted by the City of Los Angeles in this case, it became apparent to 211 Alpine Street's counsel that the City's primary argument is that the Court of Appeals erred in addressing this "sensitive use veto" issue *on its face* rather than *as applied*. Los Angeles' primary theory seems to be that this type of circumstance occurs so rarely that there is no

justification for invocation of the First Amendment's substantial overbreadth doctrine but, instead, that such challenges should be brought only as applied.

Amicus, 211 Alpine Street, wishes to bring to this Court's attention that this circumstance is not at all unusual and that the very City which is attempting to persuade this Court that this litigation is aberrant and unique, has enforced its own adult zoning ordinance in this very same manner, and obviously wants to continue to do so in the future, all to the significant detriment of 211 Alpine Street and all similarly situated parties in the future.

Because 211 Alpine Street believes it is critical that the Court be apprised of this information before determining whether to grant or deny a petition for writ of certiorari in this case, and because 211 Alpine Street is informed that this matter is presently set for conference on Friday, January 5, 2001, 211 Alpine Street hereby moves this Court for an order granting it leave to file an amicus curiae brief out of time on behalf of respondent Philip Young.

Pursuant to Supreme Court Rule 37.2(a), 211 Alpine Street sought and obtained the consent of all the parties to this action to allow it to file a brief herein as amicus curiae. Unfortunately, because 211 Alpine Street did not learn of the circumstances necessitating its filing this amicus brief until Friday, December 29, 2000, attempts to obtain timely *written* consent of all counsel have been delayed. However, undersigned counsel will submit such

written consent notices to this Court shortly hereafter under separate cover.

DATED: January 2, 2001

Respectfully submitted,

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INTEREST OF AMICUS[1]

Amicus 211 Alpine Street, LLC (hereafter simply "Alpine"), is a plaintiff in a lawsuit presently pending in the United States District Court for the Central District of California against the City of Los Angeles,[2] an amicus curiae herein. Alpine is presently locked in litigation with the City of Los Angeles under circumstances almost exactly identical to those presented in *City of Simi Valley v. Young*. Specifically, like the City of Simi Valley, the City of Los Angeles allows so-called "sensitive uses" which come into existence only *after* an adult business applicant has filed its relevant permit applications, to defeat the adult business' permit application. That is in fact what happened in the current district court litigation between Amicus 211 Alpine Street and the City of Los Angeles.

Specifically, 211 Alpine Street had filed building permit applications for a live entertainment adult business use, to operate at a property it had purchased at a cost of more than a million dollars. It had made this purchase only after carefully insuring compliance with all of the City's zoning ordinances, including its special "adult" zoning ordinances. However, after it filed its applications, a nearby landowner announced his staunch opposition to such development, and he then quickly obtained a new certificate of occupancy from the City allowing him

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[1] No counsel for a party in this action had any part whatsoever in the preparation or authorship of this amicus brief. The sole funding for this brief has come from Amicus Curiae 211 Alpine Street, L.L.C.

[2] *211 Alpine Street, LLC v. City of Los Angeles*, C.D. Cal. No. 00-8791 ER (AJWx).

to use a small part of his existing commercial property as a so-called "classroom", i.e., a "school." A sham school was then established on the site, and 211 Alpine's permit application was then denied based on the existence of this so-called "school."

In short, both in the pending district court case and here in *City of Simi Valley v. Young*, the so-called "sensitive use" is not a true arm's length "sensitive use" but, rather was created by a private citizen group solely for the purpose of defeating a pending adult business permit application. However, 211 Alpine Street's constitutional concerns would be no less great if the opposed private landowner had in fact established a *legitimate* school. The point is simply that the City's ordinance scheme allows applicants like 211 Alpine Street to be held hostage by the determined efforts of private citizens opposed to their use.

For these reasons, Alpine has a substantial interest in the outcome of this litigation, and believes it has a valuable perspective to present to this Court in connection with its decision whether to issue a writ of certiorari herein.

BRIEF OF 211 ALPINE STREET, LLC, AS AMICUS CURIAE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I

THE CITY OF LOS ANGELES' AMICUS BRIEF INCORRECTLY DESCRIBES THE RULING OF THE COURT OF APPEALS

In its Amicus Brief (at p. 4), the City of Los Angeles seriously misstates the opinion of the Court of Appeals in this case. Specifically, the City states:

> "Second, the Court studiously ignored the impact of the pre-existing sensitive land use, the karate school, requiring the City to issue a concededly invalid permit."

The statement above is a total misreading of the opinion of the Court of Appeals. Contrary to the City's statement above, at no point did the Court of Appeals require the City to issue a permit to the plaintiff. Indeed, had that been the intention of the Court of Appeals, there would have been no reason for the court to then proceed to analyze the validity of the City's zoning restrictions. However, after finding the "sensitive use veto" feature facially unconstitutional, the Court of Appeals nonetheless proceeded to examine the constitutionality of the zoning ordinance. This was because the Court of Appeals recognized that the karate school was not an "after-arriving sensitive use" and, therefore, the court's invalidation of the "sensitive use veto" feature would not necessarily be dispositive of the plaintiff's permit application.

Indeed, given that the Court of Appeals *reversed* the District Court and *upheld* the city's zoning scheme in all respects other than the sensitive use veto feature, it is clear that, on remand, the karate school's continued existence would justify denial of the request for a permit.

However, the court's invalidation of the "sensitive use veto" feature was by no means an idle act. By virtue of the Court of Appeals' holding, respondent would be free to find another site within the city without fear that a private citizen opposed to his business could block his

opening at a proper site.[3] Indeed, as noted in the Response to Petition for Writ of Certiorari, the respondent testified that he would in fact seek another site in Simi Valley but for the fact that he is chilled from doing so by the ordinance's sensitive use veto feature.

The Court of Appeals' facial invalidation of the "sensitive use veto" feature not only benefited this respondent, it also fulfilled one of the most salutary purposes of the doctrine allowing facial challenges, i.e., protection of the public and of third parties not before the court against laws which unconstitutionally restrict First Amendment rights. By virtue of the Court of Appeals' decision, any future applicant attempting to locate an adult business in Simi Valley may do so, confident in the knowledge that if they comply with all the City's requirements, private citizen groups opposed to their use cannot cause them to lose their entire investment. For all these reasons, the Court of Appeals' resolution of this case was fully consistent with this Court's decisions regarding facial overbreadth challenges.

Moreover, the Court of Appeals' decision was also consistent with this Court's admonition in *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985), that federal courts should strike state laws only to the extent that they are unconstitutional, but no further. Rather than invalidating the *entirety* of Simi Valley's adult zoning restrictions, the Court of Appeals properly enjoined their enforcement only to the extent that the City might ever

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[3] Likewise, if it is found, on remand, that the karate school has gone out of business, the Court of Appeals' opinion would allow respondent to re-apply at *this* location.

again attempt to deny an adult business permit application solely on the basis of an after-arriving sensitive use.

In short, nothing about the Court of Appeals' unexceptional decision would warrant this Court's review.

II

CONTRARY TO THE ASSERTIONS IN THE CITY OF LOS ANGELES' AMICUS BRIEF, THE COURT OF APPEALS DID NOT IN ANY WAY MISAPPLY THE SUBSTANTIAL OVERBREADTH DOCTRINE

The City of Los Angeles' primary argument is that the Court of Appeals erred in addressing this "sensitive use veto" issue *on its face* rather than *as applied*. The City suggests that this ruling somehow violated the limitation on the substantial overbreadth doctrine which this Court articulated in *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), and *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984). However, nothing in the Court of Appeals' opinion remotely departs from this Court's substantial overbreadth holdings in *Broadrick* or *Taxpayers for Vincent*.

Broadrick and *Taxpayers for Vincent* both reaffirmed the special First Amendment doctrine allowing facial overbreadth challenges by a litigant whose own First Amendment rights are not being violated by the statute. So long as the litigant has Article III standing and is in fact adversely affected by the operation of the challenged statute, this Court allows such an individual to bring a facial First Amendment challenge to such a law. *See, e.g., Bigelow v. Virginia*, 421 U.S. 809, 815-816 (1975), and *New York v. Ferber*, 458 U.S. 747, 769 (1982).

The only limitation imposed on the substantial overbreadth doctrine by *Broadrick* and *Taxpayers for Vincent* is that in order to invoke this special First Amendment overbreadth standing, the party presenting this challenge must demonstrate that the overbreadth of the statute is "substantial" in comparison to its plainly legitimate sweep.

In *New York v. Ferber*, 458 U.S. 747 (1982), this Court held that a child pornography statute could not be held facially invalid in all its applications merely because there were a very small number of instances where its application might be unconstitutional; however, *Ferber* recognized that the substantial overbreadth doctrine remains in full force and effect where there are statutes which are either "incapable of limitation" or which have "the potential to repeatedly chill the exercise of expressive activity by many individuals." 458 U.S. at 772.

The "sensitive use veto" aspect of petitioner's adult zoning scheme is unquestionably one which can and will repeatedly chill the exercise of expressive activity by most, if not all, future adult business entrepreneurs. The record below illustrates that it takes, at a minimum, many months to obtain all the requisite building permits and operating permits to construct an adult entertainment theatre featuring live entertainment, obviously with a substantial investment cost. (Amicus Alpine, for example, has expended well over a million dollars.) No reasonable entrepreneur, knowing that the establishment of any future site in Simi Valley will require great sums of money, great periods of time, and will be a target for any private citizen opposed to the business, would likely attempt to establish such a business in Simi Valley. In

other words, this is precisely the type of ordinance which will likely "repeatedly chill the exercise of expressive activity by many individuals." *Ferber*, 458 U.S. at 772. Consequently, the Court of Appeals' order of partial facial invalidation is perfectly consistent with the First Amendment substantial overbreadth doctrine as articulated by this Court in *Ferber*, *Broadrick* and *Taxpayers for Vincent*.

Even beyond this, however, the present record reflects that the respondent *himself* expects to benefit from the Court's condemnation of the sensitive use veto aspect of the City's adult zoning scheme. Accordingly, respondent does not even need to rely on this Court's "substantial overbreadth" doctrine, but instead, could and did assert the need for future protection of *his own* constitutional rights. As this Court noted in *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503-504 (1985), it is unnecessary to invoke *Broadrick*'s substantial overbreadth doctrine where the challenged law has the potential to interfere with the appellees' *own* First Amendment rights.[4]

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[4] In *Brockett*, the plaintiff was an adult bookstore owner challenging a potentially overbroad definition of the term "prurient interest" in a state statutory ban on obscenity. Whereas the Court of Appeals had invalidated the obscenity statute in its entirety due to this defect, this Court held that the maximum remedy, if any, should be partial facial invalidation, i.e., invalidation of only a few portions of the definition of "prurient interest," while leaving the rest of the obscenity statute standing. However, this Court concluded that it was not necessary to invoke the substantial overbreadth doctrine, as the portion of the statute which was assertedly unconstitutional threatened the plaintiff's *own* future exercise of First Amendment rights. That is the same circumstance present here.

Here, as in *Brockett*, the chilling effect of the challenged portion of the law before the Court deters a litigant from exercise of his *own* First Amendment rights. Consequently, it was perfectly appropriate that the Court of Appeals "declared [the ordinance] invalid to the extent that it reache[d] too far, but otherwise left [it] intact." *Brockett*, 472 U.S. at 504.[5]

Finally, even if this *were* a situation where respondent had to rely exclusively upon the First Amendment's "substantial overbreadth doctrine" in order to qualify for relief, it would not be correct, as implied by amicus City of Los Angeles, that the challenged overbreadth is not "substantial." Los Angeles' primary theory seems to be that this type of circumstance occurs so rarely that there is no justification for invocation of the First Amendment's substantial overbreadth doctrine but, instead, that such challenges should be brought only as applied.

However, Alpine's own experience with Amicus City of Los Angeles demonstrates that this circumstance is not at all unusual, and that the very City which is attempting to persuade this Court that this litigation is aberrant and unique, has enforced its own adult zoning ordinance in this very same manner, and obviously wants to continue to do so in the future.

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[5] The Court of Appeals' partial facial invalidation could have been performed *either* under the substantial overbreadth doctrine, or by recognition of respondent's need to obtain prospective protection of his *own* First Amendment rights. Consequently, the basis chosen for standing here was inconsequential.

III

THE SUBSTANTIVE FIRST AMENDMENT PORTION OF THE COURT OF APPEALS' DECISION IS NOT IN CONFLICT WITH ANY DECISION OF THIS COURT, NOR IS IT IN CONFLICT WITH ANY DECISIONS OF ANY STATE COURT OR ANY OF THE LOWER FEDERAL COURTS

Amicus City of Los Angeles also attacks the merits of the Court of Appeals' opinion under the First Amendment, but does not specify any conflict which would warrant issuance of this Court's Writ of Certiorari. Indeed, this is not surprising since this is a case of first impression.

Moreover, there was nothing erroneous or inconsistent about the First Amendment ruling embodied in the decision of the Court of Appeals below. This Court's decisions are replete with examples where rules or procedures inapplicable in other contexts nonetheless have been applied in First Amendment contexts as the only way of insuring the protection of rights which can easily be destroyed under the guise of content-neutral regulation. The rationale for special protections demanded by the First Amendment was perhaps best explained by this Court in *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988). In that case, this Court carefully noted the distinction between laws which require a permit only from those defined by the content of their expression, contrasted to laws of general application which are not aimed at conduct commonly associated with expression. *Id.* at 760-761.

What Amicus City of Los Angeles ignores is that the "sensitive use veto" exists *only* in the context of an ordinance which is specifically aimed predominately at expressive businesses.[6]

Because it is only, or primarily, businesses defined by their expression which are subject to Simi Valley's "sensitive use veto," it is only appropriate that the First Amendment was invoked to protect such businesses against this unique type of a threat to expression. The Court of Appeals' decision was simply a logical extension of this Court's determination in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), recognizing the First Amendment requirement that municipalities may not create special zoning schemes just for adult businesses if those schemes effectively deny them a "reasonable opportunity" to open and operate. *Id.* at 54.

In sum, the Court of Appeals' opinion is neither inconsistent with this Court's prior holdings, nor is it inconsistent with the decisions of any other federal courts to date, nor the decisions of any state court. In short,

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[6] In *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990), this Court held that an adult business ordinance was subject to facial challenge under the First Amendment even though admittedly, not every regulated adult business was one which involved expressive activities. *See* 493 U.S. at 224. This Court explained that a facial challenge is nonetheless appropriate with respect to such ordinance schemes because they are more "onerous with respect to sexually oriented businesses than with respect to the vast majority of other businesses." *Id.* at 225.

there is simply no pressing reason for this Court to grant review in this case.

DATED: January 2, 2001

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